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NO.

in the Supreme Court of the United States

October Term, 1983

IRON ARROW HONOR SOCIETY, a "tap" or recognition association for men, et al.

Petitioners,

vs.

MARGARET M. HECKLER, Secretary of the Department of Health and Human Services, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Can a University be denied Title IX funding because it allows an all-male honor society, which receives no financial or other tangible assistance from the University, to use campus facilities for its "tapping" ceremony?

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*Pursuant to Rule 21(b) of the Rules of this Court, the parties to the proceeding are Iron Arrow Honor Society (and its Chief); University of Miami; and the Secretary of the Department of Health and Human Services. Supporting the Secretary as amicus below was the Women's Commission of the University of Miami.

TABLE OF CITATIONS

The Petitioner, Iron Arrow Honor Society (hereinafter "Iron Arrow") prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Fifth Circuit entered in this cause on April 11, 1983.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported at 702 F.2d 549. [A.1] The opinion followed this Court's Order of June 28, 1982 [A.50], vacating and remanding the 1981 opinion of the Fifth Circuit in this cause, reported at 652 F.2d 445 [A.52], for further consideration in light of *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 11, 1983. This petition was filed within ninety days of that date.

The jurisdiction of this Court is invoked under Title 28, Sections 1331, 1681, 1682, United States Code (1976), and Title 5, Section 72, United States Code (1976), *et. seq.*

STATUTES INVOLVED

The following statutes and regulations are involved: Title IX of the Education Amendment of 1976 §§901-02; as codified in Title 20, sections 1681-82, United States Code (1976):

20 U.S.C. §1681(a)(c) 1976:

Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

* * *

Social fraternities or sororities; voluntary youth service organizations

(6) this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts,

Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

20 U.S.C. §1682 (1976)

Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient

as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Code of Federal Regulation §86.31(a), (b)(7)

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§86.31 Education programs and activities.

(a) General. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extra-curricular, research,

occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) **Specific prohibitions.** Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

* * *

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.

STATEMENT OF THE FACTS

On June 23, 1972, "Title IX" (§901 of Public Law, 92-318, 86 Stat. 373) became effective. That law provides:

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program

or activity receiving Federal financial assistance except that: . . .

(6) this Section shall not apply to membership practices –

(A) of a social fraternity or social sorority which is exempt from taxation under section 501 (a) of Title 26, the active membership consists primarily of students in an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age; . . .

Title 20, section 1681, United States Code (1976).

Prior to any regulations being adopted by the then Department of Health, Education and Welfare (HEW), it received a complaint against Iron Arrow for discrimination against Indians in violation of Title VI of the Civil Rights Act of 1964 and for discrimination against women under Title IX. The university was informed of this complaint, but before the end of the year, the Indian charge was dropped, and Iron Arrow was absolved of wrongdoing in that regard.

On May 24, 1976, the Office of Civil Rights (O.C.R.) wrote to the president of the university, stating that

O.C.R. had concluded its investigation and had found a Title IX violation:

> It is undisputed that the University of Miami receives Federal financial assistance in the form of student aid and that the Iron Arrow Honor Society does not admit women to membership. Such facts indicate that the University of Miami is in noncompliance with Title IX *if the University provides significant assistance to Iron Arrow* . . . .
>
> The assistance to Iron Arrow Honor Society is of two types. First, Iron Arrow benefits from recognition and identification with the University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial services, alumni mailings, and the use of meeting rooms.
>
> • • •
>
> Accordingly, we are informing you that in order for the University of Miami to fulfill its obligation under Title IX, it must either require the Iron Arrow Honor Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society.

Letter of William H. Thomas to Henry King Stanford, May 24, 1976. (Emphasis supplied.) [A. 92-95].

The university requested additional time to respond, which was granted on July 30, 1976, but in that communication, O.C.R. changes its position:

> We have reviewed Mr. John T. Benedict's memorandum regarding changes in the relationship between Iron Arrow Society and the University. The memorandum does not alter our findings set forth in our May 24, 1976 letter. There continues to be a *significant relationship* between the Society and the University for coverage of the society under Title IX of the Educational Amendments of 1971.

Letter of William H. Thomas to Henry King Stanford, July 30, 1976. (Emphasis supplied.) [A. 96].

Mr. Thomas' letter referred to the HEW regulations allegedly implementing Title IX, which became effective on July 21, 1975:

> Except as provided in this subpart, in providing any aid, benefits, or service to a student, a recipient shall not, on the basis of sex:
>
> (7) Aid or perpetuate discrimination against any person by providing *significant assistance* to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees . . . (Emphasis supplied)

45 C.F.R. §86.31(b)(7).

The university asked for further time from O.C.R. so as to continue in its efforts to encourage voluntary compliance by Iron Arrow, but at the same time President

Stanford wrote to the "Iron Arrow Brothers" and said that the university would comply with HEW's directive and would refuse to "contest the action of HEW in the Courts."

Following an O.C.R. directive that "no Iron Arrow Society functions, such as tapping take place until the question of the University's compliance is resolved," Iron Arrow filed its complaint in the United States District Court for the Southern District of Florida. An emergency hearing was held on its request for a preliminary injunction, but it was denied. The society then moved for a summary judgment. In its supporting memorandum, a summary of the admissions and denials contained by the defendants in their respective answers was detailed, a part of which is set forth below:

> That the plaintiff, Iron Arrow Honor Society was founded in 1926 as a recognition society to honor the University of Miami students, faculty and alumni who have made outstanding contributions in leadership and services to the University. That it was to be the "highest honor attained by men."
>
> That the Iron Arrow was "chartered" by the University of Miami and that the allegations in the complaint concerning that chartering are accurate.
>
> That Iron Arrow is in fact a recognition society rather than a traditional "honor" society. That future membership is conditioned on the unanimous approval of Iron Arrow

membership, based upon subjective standards and *not* upon criteria developed by the University or any outside agency.

* * *

The University of Miami admits to all of the allegations of paragraph 6 in which the plaintiff has traced its relationship with the university. This includes the admission that the University provides no financial assistance to Iron Arrow, gives no special recognition to members of Iron Arrow and that Iron Arrow receives no other tangible support. The federal defendants have, however, denied those specific allegations while joining with the University or not contesting that the standards for admission to Iron Arrow are established by Iron Arrow, not the University, that there is a voluntary faculty advisor chosen by Iron Arrow not the University, that support by the alumni association for mailing, printing and posting has been discontinued, that there has been no secretarial support of Iron Arrow since 1973, that the Iron Arrow mailbox in the Student Union Building has been eliminated, and that "in brief, the plaintiff could 'move all activities off campus yet retain identical prestige in the community' with the exception of the tapping (selection) ceremony."

* * *

The Federal defendants admit and the University claims no knowledge that the

> regulations of defendant, HEW, do not purport to extend control over groups or organizations as to which a covered education institution does not "provide significant assistance. However, a non-exempt organization whose membership was restricted to members of one sex could adhere to its restrictive policies, and operate on the campus of a recipient University, if it receives no assistance from the University."

HEW fact sheet, June 1975, page 9. (R. at pp 66-70).

The federal defendants filed a cross-motion for summary judgment. On May 24, 1977, the district judge *sua sponte* dismissed the cause for lack of standing on the plaintiff's part. An appeal was taken to the United States Court of Appeals for the Fifth Circuit, which reversed that ruling. *Iron Arrow Honor Society v. Califano*, 597 F.2d 590 (5th Cir. 1979). The matter was returned to the district court and transferred to a new judge, who then considered the motion for summary judgment.

The petitioner submitted additional testimony through affidavit from the "Chief" of the Iron Arrow Tribe in support of its motion for summary judgment. That affidavit set forth the extent to which the "significant assistance" flowed from Iron Arrow to the university, rather than from the university to Iron Arrow. Supplied to the court at the same time was certain material from HEW to concerned individuals around the country which sets out some standards for determining when "significant assistance" exists and highlight the continuing lack of any guidelines for making such determination.

The United States District Court ruled against Iron Arrow and upheld the agency's view that the University provided "significant assistance" to Iron Arrow. *Iron Arrow Honor Society v. Hufstedler*, 499 F. Supp. 496 (S.D. Fla. 1980). An appeal was taken, but the Fifth Circuit affirmed. *Iron Arrow Honor Society v. Schweiker (I)*, 652 F.2d 445 (5th Cir. 1981). The Fifth Circuit acknowledged that the only "support" given by the University to Iron Arrow was allowing "use of the mound in front of the student union building and the statue there for 'tapping' for new members." 652 F.2d at 448. Nonetheless, the Fifth Circuit held that since Iron Arrow is composed of members of the University community, "Iron Arrow could not exist without the University." Therefore, the University could not receive federal HEW funds if the University maintained any "continued association" with Iron Arrow. *Id.*

In response to Iron Arrow's petition for certiorari, this Court vacated and remanded the Fifth Circuit opinion for further consideration in light of *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), which had held that "an agency's authority under Title IX both to promulgate regulations and to terminate fund is subject to the program-specific limitation" of the statute.

On remand, the Fifth Circuit, Judge Roney dissenting, found that:

> since . . . the Supreme Court's decision in *North Haven*, because of its reliance upon *Board of Public Instruction v. Finch*, not only permits our approving the Secretary's actions, but

> compels such a result, and because we also find that the language of Title IX and its legislative history support this conclusion, we reinstate our prior decision in this case.

Iron Arrow (II), 702 F.2d at 565 [A.42]. Indeed in so doing, the court held that Iron Arrow, "by its very existence unavoidably and necessarily taints each and every federally assisted program at the University." *Iron Arrow (II)* at F.2d at 564 [A.42]. Therefore, as the Fifth Circuit sees it, any actions of the University except expressions of outright hostility toward Iron Arrow, a society which exists to support the University, put the University at risk of loss of its federal funding.

REASON FOR GRANTING THE WRIT

I. The Appeals Court Has Ignored the Program-Specific Limitation of Title IX.

This Court, in *North Haven*, established that the plain language of Title IX means what it says: the statute only affects "programs" or "activities" which receive federal funds. As this Court pointed out, "Congress failed to adopt proposals that would have prohibited all discriminatory practices of an institution that receives federal funds." The plain import of the legislative history is that specific programs would be the target of Title IX: perhaps the football program or hiring in the English Department.

Regulation §86.31(b)(7), *codified at* 34 CFR §106.31(b)(7), states:

> Except as provided in this subpart, *in providing any aid, benefit, or service to a student*, a recipient shall not, on the basis of sex: aid or perpetuate discrimination against any person by providing *significant assistance* to any agency, organization, or person which discriminates on the basis of sex to providing any aid, benefit or service to students or employees. (Emphasis added).

The Fifth Circuit originally approved this regulation in one or two sentences as "effectuating" the "objectives of the statute." *Iron Arrow (I)*, 652 F.2d at 447. After this Court vacated and remanded for consideration, the Fifth Circuit, rather than reconsider, reaffirmed its earlier conclusion even more briefly:

> After careful study, we now determine that the case law, including the *North Haven* decision, strongly supports our prior conclusion that Regulation 86.31(b)(7) is valid both on its face and as applied.

Iron Arrow (II), 702 F.2d at 555. After finding that the regulation effectuates the purpose of Title IX in combatting discrimination, the Fifth Circuit then found that the agency's application of the regulation in this case was defensible. Somewhere along the trail, the explicit limitation of Title IX to specific "programs" or "activities" of a recipient was lost.

This Court held in *North Haven* not only that termination of funds as a remedy was limited "to the particular program, or part thereof, in which . . . noncompliance has been . . . found," but also that the "agency's authority to promulgate regulation" is limited to the control of discrimination in specific "programs" or "activities" receiving federal assistance. Iron Arrow cares not whether its seven-year-old wound arises from promulgation of an invalid regulation by HEW, or in the incorrect interpretation of a valid one. HEW erred in both ways, and petitioner's complaint is that HEW, and the Fifth Circuit, in approving the termination of all funds to the University and Iron Arrow's ouster from campus, have reached a result plainly contrary to the language of the statute and the holding of this Court in *North Haven*, as well as one likely to cause dangerous consequences for coercion of private universities by federal agencies.

It is undisputed that Iron Arrow itself is neither a "program" nor an "activity" of the University, and, of course, that it receives no federal financial assistance of any kind. It is also undisputed that only one action of the University might be interpreted as giving "assistance" to Iron Arrow—allowing the society to use the University's public areas for its "tapping" ceremony.

From these facts, it is beyond question that Iron Arrow's membership policies are outside the scope of Title IX.

Congress could have, if it wished, stated that any university or other institution which discriminates *in any of its programs or activities* would lose federal

funding.* As this Court pointed out at length in *North Haven*, such statutes were proposed, but not enacted. The inevitable effect of the statute actually passed is that, for example, a university has the choice of whether or not to maintain, without federal funding, a particular practice viewed as discriminatory by the funding federal agency without peril to other programs which are federally funded and nondiscriminatory. If in such a case the federal agency may threaten to cut off *all* funds because of the "very existence" of the discriminatory program or the "continued association" of the university with it, the careful program-specific language of the statute would be ineffective and useless verbiage. This Court's description of the "program specific" nature of the statute would be of no significance. Federal funding agencies would be given great coercive powers to control the actions and even public positions of private universities, and other affected entities. This is exactly the mandate divined by the Fifth Circuit's bizarre interpretation of *North Haven*.

This potential could not be made more clear than by this case. Although Iron Arrow is a society of men of the University of Miami community and its purpose is to support the University of Miami, that University has been forced by a federal bureaucracy not only to forebear giving even the minimal support to Iron Arrow which it ever gave, but also to take a public position of hostility toward Iron Arow—all in an effort to keep the millions of dollars of federal funding which the University uses in all of its programs and activities.

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*For the purposes of this argument, we assume that the University is "discriminating" in allowing Iron Arrow to use its campus. As we show below, there is no such "discrimination" by the University in the record in this case.

The vice in this vast coercive power if not just that a federal bureaucracy can control private decisions of a university. Sometimes laws have exactly that result. But where, as here, Congress intended, and by well-chosen language sought to ensure, that this power would not exist, the result is totally unacceptable. The Fifth Circuit's refusal to respect the "program-specific" language of the statute makes the case a pernicious precedent not only for the vibrancy of the country's pluralistic private universities, but also for the distortion of the entire thrust of *North Haven* within the Fifth and Eleventh Circuits and elsewhere.

It is quite apparent that the Fifth Circuit was dissatisfied with the result plainly dictated by the language of the statute and *North Haven*. In an extraordinarily lengthy adjectival opinion, the Fifth Circuit reinstated the very decision which had been vacated by this Court. Faced with the vacation of its earlier decision by this court and directed to measure the case by *North Haven's* yardstick of program–specificity, the Fifth Circuit simply elected to make the entire university (and at times, when it felt more expansive, the entire "university community") a "program" by virtue of the "very existence" of Iron Arrow as a single-sex organization. *Iron Arrow*, 702 F.2d at 564. [A.42].

Such a result turns *North Haven* on its head. Not only does the decision torture *North Haven's* plain language, it also contradicts the decision of the First Circuit in *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982), which squarely rejected the Fifth Circuit approach. There a female had asked to:

> have [the Court] interpret "education program" in this case to mean Harvard Law School, thereby permitting her to invoke the protection of Title IX. Such an interpretation is essential to her claim, as *she has not specified any federally funded program in which she suffered discrimination because of her sex.* Her argument is that, by virtue of the law school's status as a recipient of federal funds through such specific programs as work-study, *Title IX applies whenever the school discriminates in any area, regardless of whether the discrimination occurs in an area that is federally funded.*

Rice, 663 F.2d at 338 (Emphasis added). The First Circuit was not impressed:

> By alleging merely that Harvard Law School receives federal funds for its work study program, without alleging sex discrimination in the handling of that program, [plaintiff] has failed to bring herself within the protection of Title IX.

Id. at 339.

Nor can any effort to distinguish *Rice* on its facts succeed. Assuming Plaintiff's allegations that professors intentionally and systematically lowered the grades of female law students are taken as true – as they had to be for the purposes of the motion to dismiss at issue in *Rice* – a pervasive detrimental effect on the "self worth" or "motivation" of women would be much more likely than here where a supersensitive, strident Fifth Circuit took exception to the University of Miami's passive

tolerance of an honors society of University boosters. The First Circuit was not concerned with such nebulous concepts, however, since like this Court in *North Haven*, the First Circuit recognized that Title IX is concerned only with sex discrimination in the school's handling of federally-funded programs.

Numerous other courts have reached this same conclusion. The Sixth Circuit in *Hillsdale College v. Department of Health Education and Welfare*, 696 F.2d 418 (6th Cir. 1982) stated the point well:

> We do not believe that Congress intended, in enacting Title IX, to authorize HEW pervasively to regulate entire colleges and universities because federal money benefits the entire institution.

Hillsdale, 696 F.2d at 429-30. In so ruling, the Sixth Circuit mandated that HEW could not prevent anything it viewed as "sex discrimination" at a college solely because many of its students took advantage of federal loan programs.

Other courts have recognized that only university programs and activities which receive federal funds are subject to Title IX. *Othen v. Ann Arbor School Board*, 507 F. Supp. 1376 (E.D. Mich. 1981), *aff'd.*, 699 F.2d 309 (6th Cir. 1983); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982) (specifically rejecting *Iron Arrow* decision).

Essentially the Fifth Circuit majority in this case aligned itself with the Third Circuit in *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*,

75 L.Ed. 2d 429 (1983), which held that when some of a college's students used federally-subsidized student loans, the college was subject to plenary regulation of any "discrimination" by HEW. The *Iron Arrow* case should be considered along with *Grove City College* as this Court resolves the conflict between the Circuits on the key issue of interpretation of Title IX. This case presents the "program-specificity" issue in the context of outside student organizations rather than student loans.

We could not persuade the Fifth Circuit, despite two appearances before it, that the language of Title IX means what it says. This Court has been no more successful. In *North Haven*, this Court went out of its way to guide the lower courts on the issue. The Third Circuit and, in the case now in question, the Fifth Circuit, have not taken this court's suggestion to heart — even where, as here, the original opinion was pointedly vacated for reconsideration. The subtle approach having failed, it is now time to wield a heftier tool. This case is for that reason an appropriate case for exercise of this Court's writ of certiorari.

II. The "Very Existence" of Iron Arrow on the University Campus Does Not Pervasively "Infect" or "Taint" All Federally Funded Programs.

In an almost pathetic attempt to clothe its earlier rationale in a *North Haven* cloak and attempting to disguise obvious conflict with other case law, the Fifth Circuit claims that if the University of Miami allows Iron Arrow to use the campus in any manner whatsoever,

this tolerance would be a "pervasive practice affecting all assisted programs or activities conducted by the institution." *Iron Arrow (II)*, 702 F.2d at 563. [A.38].* The narrowness of this standard is appropriate—in striking contrast to the manner in which the exception was applied by the Fifth Circuit.

The exception must be a narrow one in light of the program-specific nature of the purpose of title IX—that federal funds not be used to perpetuate discrimination in the University's programs—and the remedy authorized by the statute—cutoff of federal funds to specific programs. Cutoff of all funds to an entire institution is only authorized, as shown by the legislative history grudgingly cited by the Fifth Circuit majority (*Iron Arrow (II)*, 702 F.2d at 563 [A.38]), in narrow circumstances. To justify such a draconian result, the prohibited discrimination must so pervade a university that funds cannot be given to *any* part or program of it without federal funds sharing in the taint. If the practice is viewed as discriminatory is not pervasive, however, Title IX only authorizes cutoff of funds to the particular program.

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*Not only did the Fifth Circuit miss the reason for this Court's return of the case to it, the appeals court viewed the remand order as an opportunity to wax even more eloquently on its theory of "pervasive infection" of a University.

The entire straw house of the Fifth Circuit's *Iron Arrow (II)* decision is based on the substitution of the whole (University) for one of its parts (a "program"). Otherwise, the Fifth Circuit would unavoidably be hoisted on the petard of program-specificity. If this simple expedient is as readily available as the Fifth Circuit thinks, "program-specificity" and this Court's discussion of the concept in *North Haven* will have no practical significance.

The courts have agreed that a discriminatory admissions policy is one sort of pervasive practice of a university (perhaps the only one) that may be prohibited by HEW regulation and which may put the university at risk of loss of all federal funding. As the First Circuit acknowledged in *Rice*, a discriminatory admissions policy will necessarily prevent applicants discriminated against from participating in any federally-funded program. *Rice*, 663 F.2d at 339 n. 2.

Allowing Iron Arrow to use the university grounds for its tapping ceremony obviously will have no such effect. Indeed, the Fifth Circuit acknowledged that "neither Iron Arrow nor the University has 'kept one penny of federal financial assistance from being available to the women students at the University as much as to the male students there.' " *Iron Arrow (II)*, 702 F.2d at 555 [A.19].

Rather than apply the program-by-program approach of the statute, which carefully tailors the penalty to the violation of public policy, the Court applied the "pervasive practices" exception in a way that would swallow the general rule. The effect of this interpretation is that any practice viewed as discriminatory by HEW—even if no federal funds are involved—can be controlled by HEW, poised as it is with its garrote around the financial jugular of the University. Title IX requires a scalpel; the Fifth Circuit used a bludgeon.

Furthermore, the Fifth Circuit stretched the bare record in this case into the realm of fancy when it found that Iron Arrow's use of public campus grounds twice a year to "tap" its members would "infect the entire academic mission of the University." *Iron Arrow*

(II), 702 F.2d at 555. [A.17]. The minimal record is clear that University of Miami gives no significant assistance whatsoever to Iron Arrow.

Undeterred by the facts or the record, Senior Judge Tuttle and Judge Anderson concluded that the "very existence" of Iron Arrow pervaded the University of Miami's entire academic mission. The Court's explanatory opinion, tinged with the emotionalism of a colorful closing jury argument, is devoid of support in logic or in the record:

> The existence of the all-male Iron Arrow Honor Society as the most prestigious honorary-recognition society at the University has a pervasive discriminatory effect upon women in all of the University's academic programs, federally funded or not. All federal programs at the University of Miami are necessarily infected by what amounts to a general and overriding policy of the University. *This infection results from the University's close historical ties with Iron Arrow.* The Supreme Court has recognized that "[a] sense of inferiority affects the motivation of a child to learn." [Citing *Brown v. Board of Education*].

Iron Arrow (II), 702 F.2d at 561 [A.32-33] (Emphasis added).

The Fifth Circuit appeared inescapably drawn to the ultimate inquiry as to whether any female student at the University would bother to learn if she could not join Iron Arrow. Stirred by its own language, the Court proceeds to muse about the woes of the "woman chemistry

professor," whose "motivation in conducting her research may be adversely affected, in a subtle manner, because [she knows] that *the University community* will never formally recognize and accept . . . that [her] work is of the same quality as that of male students or faculty." *Iron Arrow (II)*, 702 F.2d at 561 n. 22 [A.34] (Emphasis added). Having come this far, the conclusion is inevitable: "Iron Arrow's practices . . . subtlely undermine the self worth of women who participate" in the University. *Iron Arrow (II)*, 702 F.2d at 562 [A.36].

While the thought of a female student or professor driven to questioning the meaning of life when faced with the deprivation of Iron Arrow membership might otherwise be amusing, this type of legal reasoning is not as humorous today in the Fifth or Eleventh Circuits.

Aside from the total factual implausibility of the Fifth Circuit's bare conclusions, two significant implicit legal errors make it imperative that this Court grant the Writ to finally correct the Fifth Circuit's mistake, since such correction could not be coaxed by this Court's prior action.

First, the court below not only refused to respect the "program-specific" nature of the statute, but it even ignored the fact that it is *the University* which (even for the most pervasive discrimination) is the relevant entity. The Court instead focused on *the University community*, an entity which receives no federal funds and whose actions or attitudes (however those might be defined) are a matter of indifference to funding agencies as far as Title IX is concerned.

A second error in the analysis of the Fifth Circuit was its reliance, repeated at numerous crucial points in the opinion, on the "historical ties" of the University with Iron Arrow. The fatal error in this argument is that Title IX, and even its implementing regulations, are written in the present tense. No discriminatory actions of the University in the past were cited. Even if there were such actions, they cannot be punished by a present denial of federal funding.

The Fifth Circuit clearly disapproves of single-gender societies which are in any way prestigious or exclusive: "We are disturbed that *the University community*, which in theory premises relations among its members upon the free the vigorous interplay of ideas, should classify and stigmatize the quality of those ideas solely because of the sex of their author." *Iron Arrow (II)*, 702 F.2d at 561 (Emphasis added) [A.33-34].* Judges Tuttle and Anderson are entitled to their opinion. However, irrespective of one's personal educational philosophy, single-gender private societies are not illegal. Whether or not Congress could or should ban them is not the question. It has not chosen to do so, and it has not given federal agencies the power to do so either. The relevant issue is whether any "program" or "activity" of the University (not "the University *community*") is discriminatory.

*This observation is also irrelevant as Iron Arrow does not exist to grade the worth or value of any "ideas".

The Fifth Circuit refused to recognize any middle ground between active discrimination by the University and rigid dictation of HEW's ideas of equality of treatment to private organizations among the University community. As the Fifth Circuit panel admitted in 1981, "we are unable to imagine any continued association of the society with the University of Miami" without violating Title IX. *Iron Arrow (I)*, 652 F.2d at 448. The disaffection of that court with Iron Arrow continues. To the Fifth Circuit, the point is a clear one: the University of Miami should not allow Iron Arrow to exist.

Congress did not require that America's private Universities be enslaved to HEW's view of nondiscrimination in private organizations. In the greater society, broad leeway is allowed for association of groups that choose their own members on their own terms. The law permits churches, women's organizations, black and ethnic organizations, and other organizations to fail to apply the HEW notion of nondiscrimination, however enlightened. Our free society, guaranteed by the Constitution, allows these groups to exist. A university, in the spirit of tolerance and pluralism, can do the same without running afoul of Title IX.

This case may be unique. Indeed, some may believe that the idea of an all-male honors society is anachronistic, quaint, or even misguided, but the principle of tolerance and noninterference here is a broad and important one. A private or state university can allow a student organization to use campus facilities without itself adopting the views of the organization. When Young Democrats, Young Republicans and Young Socialists all meet on campus, there is obviously no university commitment to the ideas of any. The Women's Commission

of the University of Miami, amicus in this matter to the courts below, doubtless meets on the University campus—its presence accepted, tolerated, just as Iron Arrow's, without implicating the University in its beliefs, goals or discriminations.

There are numerous organizations or campuses that are not open to all members of the University community—black student's associations, women's commissions, gay student's alliances, fraternities. As a matter of law, these may be permitted without implicating Title IX. If a university allows a Catholic service in the university chapel—when women may not serve as Catholic priests—does sex discrimination therefore pervade the university? Obviously not—and no more does the University's tolerance of Iron Arrow result in an approval of its membership policies.

Iron Arrow's cause admittedly is not stylish by today's standards. In past years, women's rights and ethnic and racial causes were not viewed favorably. A male honors society is now singled out as the object of the Establishment's wrath ironically under a (totally inappropriate) interpretation of a nondiscrimination statute. To prevent this result, this Court should grant certioriari.

(1) Since no federal funds go to Iron Arrow, directly or indirectly, Iron Arrow's practices fall outside the scope of Title IX and Iron Arrow is of no concern to the bureaucrats who administer the transfer of federal education revenues.

(2) The University's mere passive tolerance of a single-gender organization which operates in the university community is only a healthy manifestation

of American pluralism and in no way "pervades" the University with discrimination, "subtle" or otherwise.

The Fifth Circuit's contrary holding on these points is not only in hopeless conflict with better reasoned cases from the First and Sixth Circuits, but also makes a mockery of the "program specific" nature of Title IX, as explored by this Court in *North Haven*.

This Court should grant certiorari to consider the important issues raised by this petition—the scope of Title IX and whether HEW has overreached in the exercise of its power in this case.

CONCLUSION

For the reasons stated, we urge this Court to grant a writ of certiorari to review the opinion in this cause.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I, Joseph P. Klock, Jr., an attorney admitted to practice before the Supreme Court of the United States, do swear and certify that I have this 8th day of July, 1983, placed the attached Petition for a Writ of Certiorari in the Office of the United States Postal Service located at the Miami International Airport, Miami, Florida. Copies were appropriately addressed to the Clerk of the Court and to the opposing attorneys with first class postage prepaid within the time allowed for filing.

_____

Joseph P. Klock, Jr.

COUNTY OF DADE
STATE OF FLORIDA

I hereby notarize that Joseph P. Klock, Jr., personally known to me, did appear before me and swear to the above Certificate of Mailing.

_____

Notary Public

7/8/83

Appendix

TABLE OF CONTENTS OF APPENDIX

IRON ARROW HONOR SOCIETY, a "tap" or recognition association for men, et al.,

Plaintiff-Appellants,

v.

Margaret M. HECKLER, Secretary of the Department of Health and Human Services, et al.,

Defendants-Appellees.

No. 80-5663.

United States Court of Appeals,
Fifth Circuit.*
Unit B

April 11, 1983.

All-male university honorary-recognition society brought action seeking to enjoin Secretary of Department of Health and Human Services from terminating federal funding to university for giving "substantial assistance" to society. On remand, after previous appeal, 597 F.2d 590, the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., 499 F.Supp. 496, entered judgment from which society appealed. The Court of Appeals, 652 F.2d 445, affirmed. On writ of certiorari, the Supreme Court, 102 S.Ct. 3475, vacated and remanded. On remand, the Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) action continued to

*Former Fifth Circuit case, section 911 of Public Law 96-452 – October 14, 1980.

present live controversy after university's board of trustees adopted policy by which society would no longer be permitted to resume discriminatory practices on campus, even though Department then considered issue moot, and (2) where discriminatory practices of society, by their nature and in light of intertwined histories of society and university, infected entire academic mission of university, thus rendering each and every federal program at university necessarily discriminatory as result of society's relationship to university, federal regulation under which university was threatened with termination of federal funds for giving substantial assistance to society was valid both on its face and as applied.

Affirmed.

Roney, Circuit Judge, dissented and filed an opinion.

1. Federal Courts—13

In determining whether action brought by all-male university honorary-recognition society to enjoin Secretary of the Department of Health and Human Services from terminating federal funding to university still presented justiciable Article III case or controversy after university's board of trustees adopted policy by which society would no longer be permitted to resume discriminatory practices on campus, Court of Appeals had to assess whether it could effectively render relief requested by society. U.S.C.A. Const. Art. 3, §2.

2. Federal Courts—13

Action brought by all-male university honorary-recognition society seeking to enjoin Department of Health and Human Services from terminating federal funding to university under Title IX in order to deter university from allowing society to conduct certain functions on university campus continued to present live controversy after board of trustees adopted policy by which society would no longer be permitted to resume discriminatory practices on campus, even though Department then considered issue moot, in view of facts that Department could require university to take more substantial steps than merely prohibiting society from using campus facilities and that university's present policies displayed no assurances of permanence. U.S.C.A. Const. Art. 3, §2; Education Amendments of 1972, §901 et seq., as amended, 20 U.S.C.A. §1681 et seq.

3. Civil Rights—9.5

Where discriminatory practices of all-male university honorary-recognition society, by their nature and in light of intertwined histories of society and university, infected entire academic mission of university, thus rendering each and every federal program at university necessarily discriminatory as result of society's relationship to university, federal regulation under which university was threatened with termination of federal funds for giving substantial assistance to society was valid both on its face and as applied. Education Amendments of 1972, §901 et seq., as amended, 20 U.S.C.A. §1681 et seq.

4. Civil Rights—9.5

So-called "pinpoint" provision of civil rights statute permitting cutoff of federal funds only in federally supported program or activity that is actually found to be engaged in race discrimination was designed to balance need to prevent federal monies from being used to advance discrimination against fear that fund cutoffs would be exercised in a vindictive or punitive manner. Civil Rights Act of 1964, §602, 42 U.S.C.A. §2000d-1.

5. Civil Rights—9.5

Existence of all-male honorary-recognition society as most prestigious such society at university had a pervasive discriminatory effect upon women in all of university's academic programs, federally funded or not, so that all federal programs at university were necessarily infected by what amounted to a general and overriding policy of university, program-specific prohibition of Title IX was satisfied, permitting application of regulation under which university was threatened with termination of substantial contribution of federal funds for giving substantial assistance to society. Education Amendments of 1972, §901 et seq., as amended, 20 U.S.C.A. §1681 et seq.

6. Civil Rights—9.5

Program-specific prohibition of statute forbidding discrimination on basis of sex in federally funded school programs applies when a discriminatory program is "benefited" by federal financial assistance or when a federally assisted program itself is infected by a

discriminatory environment. Education Amendments of 1972, §901 et seq., as amended, 20 U.S.C.A. §1681 et seq.

Du Fresne & Du Fresne, Elizabeth J. Du Fresne, Steel, Hector & Davis, Joseph P. Klock, Jr., Miami, Fla., for plaintiffs-appellants.

Drew S. Days, III, Asst. Atty. Gen., U.S. Dept. of Justice, Civil Rights Div., Walter W. Barnett, Irving Goldstein, William Bradford Reynolds, Jessica Dunsay Silver, Walter W. Barnett, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before RONEY and ANDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

I. INTRODUCTION

This case involves the proper ambit of the non-discrimination and enforcement provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* It arises from the Supreme Court's order, ___ U.S. ___, 102 S.Ct. 3475, 73 L.Ed.2d 1363 (1982), vacating our prior decision, 652 F.2d 445 (5th Cir. 1981), and remanding in light of *North Haven Board of Education*

v. Bell, 456 U.S. ____, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). We must determine how far the Secretary of the Department of Health, Education amd Welfare[1] may extend the Congressional mandate to eliminate gender-based discrimination; the "simple justice" of this policy was articulated 20 years ago by President Kennedy with respect to discrimination on the basis of race:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious. . . .

President's Second Civil Rights Message to Congress (June 19, 1963), set out in the Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 88th Cong., 1st Sess., ser. 4, Pt. II, 1446, 1454 (1963). *Also see Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974), *quoting* 110 Cong.Rec. 6543 (1963) (Remarks of Sen. Humphrey).

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[1]The Department of Health, Education and Welfare's responsibilities for educational institutions under Title IX were transferred to the Department of Education by §301(a)(3) of the Department of Education Organization Act, Pub.L. No. 96-88, 93 Stat. 668, 678 (1979). The Department of Health, Education and Welfare was then reorganized as the Department of Health and Human Services. This opinion will refer to the appropriate party defendant as simply the "Secretary."

The Iron Arrow Society is the most prestigious honorary-recognition society at the University of Miami in Florida. Iron Arrow elects only men to membership. Male undergraduate and graduate students, alumni, faculty, administrators, and staff of the University are eligible for election to the Society on the basis of love for Alma Mater, leadership, scholarship, and humility. Those elected are initiated into the Society through a "tapping" ceremony. The Secretary determined, by letter of May 26, 1976, that the University of Miami, a private institution of higher education which receives substantial federal funding,[2] gave "substantial assistance" to Iron Arrow. This assistance, the Secretary determined, subjected the University to Title IX's prohibition against gender-based discrimination.

Iron Arrow was established at the time of the founding of the University. The first president of the University provided the impetus for its founding and granted a charter to Iron Arrow; two University presidents have "signed into law" Iron Arrow's constitution and amendments to it. Iron Arrow is the only campus organization that holds a charter granted by the University. While the University no longer provides secretarial and mailing services or meeting facilities to the Society, nothing indicates that faculty members no longer serve on membership screening committees in all of the colleges, except the law school. In addition, many plaques and monuments around the campus pay

[2]The University of Miami received $46,000,000 of federal funds in 1980, in the form of contracts, grants, and student assistance.

tribute to Iron Arrow and its members, recognizing the Society as "the highest honor at the University of Miami."[3]

Iron Arrow sought to enjoin the Secretary from terminating federal funding to the University. In our previous opinion, we affirmed the district court's denial of a permanent injunction. *See* 499 F.Supp. 496 (S.D.Fla. 1980). In reaching this conclusion, we made two findings. First, we found that the HEW regulation upon which the Secretary acted, Reg. 86.31(b)(7) (1975), 40 Fed.Reg. 24128,[4] "effectuates" the provisions of Title IX and is consistent with the achievement of the objectives of that statute. Second, we found that, in light of the close history of the Society and the University, continuing tangible and non-tangible support of the Society by the University constitutes adequate assistance to impute fairly Iron Arrow's sex discrimination practices to the University itself.

We now must reconsider our conclusions in light of the "program-specific" language in the Supreme Court's *North Haven* decision. We face the issue of the validity of the HEW regulations implementing Title IX and the Secretary's interpretation of several key phrases of

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[3]The most prominent of these monuments is on a mound outside the student union building. At the time the Secretary initiated his administrative action against the University, Iron Arrow conducted its "tapping" ceremony by removing "tapees" from class and conducting a highly visible ceremony on the mount.

[4]The regulation, originally codified as 45 C.F.R. §86.31(b)(7) (1975), has since been codified as 34 C.F.R. §106.31(b)(7) (1982) in connection with the establishment of DOE, 45 Fed. Reg. 30802 (1980).

these regulations. To assist us in this task, we requested briefs from the parties within 60 days. The Society and amicus Women's Commission of the University of Miami complied with our request. The Secretary failed to brief the substantive issues but filed a Motion for Suggestion of Mootness and a Motion for Remand. Iron Arrow responded by vigorously opposing this motion. We turn first to the mootness question before reaching the substantive issues.

II. MOOTNESS

The Secretary refers the Court to the letter dated September 23, 1982, of University President Edward T. Foote, II to C. Rhea Warren, Iron Arrow's Chief. That letter expresses the new policy of the University's Board of Trustees that it will not permit Iron Arrow to resume its discriminatory practices on campus even if Iron Arrow succeeds in this lawsuit. This letter presumably refers to the policy adopted by the Trustee Executive Committee on July 15, 1980, setting forth the requirement that Iron Arrow may only return to campus if it meets the code for student organizations, which includes a policy of non-discrimination. The Secretary, joined by amicus, contends that Iron Arrow's injury is attributable solely to the University's decision to keep it off the campus, and not to any action by the Department of Education or any possible action by this Court.

[1] In determining whether this case still presents a justiciable Article III case or controversy, we must assess whether the Court may effectively render the relief requested by the appellant. *Mills v. Green*, 159

U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895).[5] It is important to bear in mind that, while the University is the defendant in the administrative action that provided the stimulus for this lawsuit, Iron Arrow is the plaintiff which has requested injunctive relief and whose policies form the basis for the Secretary's actions. We, therefore, must consider whether enjoining the Secretary from cutting off federal funding to the University would result in any benefit to Iron Arrow.

[2] This case continues to present a live controversy. First, we find that we may still grant the plaintiffs effectual relief. The Secretary still could require, for the University to be found in compliance with Title IX, that the University take more substantial steps than merely prohibiting Iron Arrow from using campus facilities for its "tapping" ceremony. The Secretary conceivably could demand that the University, in addition to its stated policy, disestablish the historical ties between it and Iron Arrow by, *inter alia*, revoking the charter given by the University to the Society, refusing to recognize Iron Arrow any longer, withdrawing "sponsorship" of Iron Arrow by the office of the president, and prohibiting Iron Arrow from using the University's name. An injunction would serve to insulate the plaintiffs from all of these appropriate additional enforcement actions should we, for example, uphold the validity of the HEW regulation but find that the Secretary's application of the regulation in this particular instance is improper.

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[5] We note that, in evaluating the mootness of a case pending on appeal from a lower court, we are empowered to consider extrinsic evidence not appearing on the record. *Mills*, 159 U.S. at 653, 16 S.Ct. at 133.

The second reason this case continues to present a live controversy is, quite simply, because the University's present policies display no assurances of permanence. We note that the University's policy of excluding Iron Arrow from campus, even if adopted in good faith, is subject to change at a later date. The present trustee policy barring Iron Arrow from campus while the Society maintains discriminatory membership practices itself reflects a shift from University policy adopted April 11, 1977,[6] and thus indicates that such policy statements are readily changeable.[7] A long line of Supreme Court cases supports the proposition that the "[v]oluntary discontinuance of an illegal activity does not operate to remove a case from the ambit of judicial power." *Walling v. Helmerich & Payne*, 323 U.S 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944). *E.G., St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 537-38, 98 S.Ct. 2923, 2927-28, 57 L.Ed.2d 932 (1978); *United States v. Phosphate Export Association*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968) (heavy burden of persuasion where voluntary discontinuance); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953); *Hecht Co. v. Bowles*, 321 U.S. 321, 327, 64 S.Ct.

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[6]The April 11, 1977, policy of the Board of Trustees Executive Committee would have permitted Iron Arrow back on campus so long as such action was legally permissible, even if the Society continued to elect only men to membership.

[7]Moreover, the reluctance of the Secretary to enforce the regulation under attack does not moot this litigation because the regulation still is in effect. *See North Haven*, 102 S.Ct. at 1918, n. 12.

587, 590, 88 L.Ed. 754 (1944).* *Also see Otis & Co. v. SEC*, 106 F.2d 579, 583-84 (6th Cir. 1939). We are bound by another panel of this Circuit, which recently offered the following advice in this regard: "Courts should keep in mind the oft-repeated observation that 'reform timed to anticipate or blunt the force of a lawsuit offer[s] insufficient assurance that the practice sought to be enjoined will not be repeated.' " *NAACP v. City of Evergreen, Alabama*, 693 F.2d 1367, 1370 (11th Cir., 1982), *quoting James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354-55 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). We thus feel free to proceed to a reconsideration of the merits of this appeal. Appellees' Motion for Remand is denied.

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*The case of *SEC v. Medical Committee for Human Rights*, 404 U.S. 403, 92 S.Ct. 577, 30 L.Ed.2d 560 (1972), relied upon by appellees, is not persuasive here. That case against the Securities and Exchange Commission for failure to oppose a third party corporation's exclusion of a shareholder proposal was mooted not solely, as appellees suggest, because the corporation later decided to include the proposal in its proxy statement. Rather, the Court relied upon a finding of fact that Dow would not seek to exclude the proposal challenging production of napalm when the shareholders were permitted by the security laws to resubmit it in three years, because the proposal gained such little support the first time it was included in the corporation's proxy statement. We also note that we do not rely upon the "capable of repetition but evading review" line of cases in denying appellees' motion, because it is factually inappropriate in the instant case.

III. RECONSIDERATION IN LIGHT OF NORTH HAVEN

A. *The Statute and HEW's Regulation*

Section 901(a) of Title IX of the Education Amendments of 1972 provides that, "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. §1681(a). Congress gave federal agencies the power to enforce this prohibition by authorizing regulations which may include a fund cutoff provision. Section 902 provides, in pertinent part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the statute authorizing the financial assistance in connection with which the action is taken. . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by termination or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the . . . recipient as to

> whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found. . . . Provided however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

20 U.S.C. §1682.

Pursuant to this authority, HEW issued regulations in 1974. Regulation 86.31(b)(7) provided the basis for the Secretary's threatened cutoff of federal funds at the University of Miami. That Regulation provides, in pertinent part:

> A recipient shall not, on the basis of sex: . . .
>
> (7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.

40 Fed.Reg. 24128 (1975). The Secretary explained the purpose and function of this Regulation on "outside" organizations:

> Section 86.31(b)(7) prohibits a recipient from assisting another party which discriminates on the basis of sex in serving students or

> employees of that recipient. This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself. (Under section 86.6(c), a recipient's obligations are not changed by membership in any league or other organization whose rules require or permit discrimination on the basis of sex).

39 Fed.Reg. 22229 (1974). HEW also described in the Federal Register some additional standards which would guide its enforcement of Regulation 86.31(b)(7):

> [S]uch forms of assistance as faculty sponsors, facilities, administrative staff, etc. may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations.

40 Fed.Reg. 24132 (1975).

It should be noted that the statute itself fails to define the terms "education program or activity." Section

901(c) of the statute does define the term "educational institution,"[9] as follows:

> For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. §1681(c).

In our initial consideration of this case, we interpreted these comments to mean that, while the sanction of a cutoff of federal funds normally is limited to a recipient's discriminatory program or activity directly receiving federal funds, a different standard applies where an

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[9] The term "institution" is used throughout the exceptions to Title IX. Section 901(a)(1) provides that, with respect to admissions, section 901(a) applies only to institutions of vocational education, professional education, and graduate higher education, and to institutions of undergraduate higher education. Specific exceptions are made for the admissions policies of schools that begin admitting students of both sexes for the first time, section 901(a)(2); religious schools, section 901(a)(3); military schools, section 901(a)(4); the admission policies of public institutions of undergraduate higher education that traditionally and continually have admitted students of only one gender, section 901(a)(5); social fraternities and sororities, and voluntary youth service organizations, section 901(a)(6); Boys/Girls State/Nation conferences, section 901(a)(7); father-son and mother-daughter activities at educational institutions, section 901(a)(8); and scholarships awarded in "beauty" pageants by institutions of higher education, section 901(a)(9).

"outside organization" is involved. In such a case, we found it necessary to consider the substantiality of the relationship between a university and the outside party and whether that party's activities relate so closely to a university's educational program or activity, or to students or employees in that program, that these activities should be considered as activities of a university itself for the purpose of terminating federal funding.

We now turn our attention to the effect of the Supreme Court's decision in *North Haven* on our previous holding that the Secretary properly exercised his authority under Title IX when he (1) promulgated Regulation 86.31(b)(7) and (2) applied the Regulation to compel the University to disassociate itself from the Society so long as Iron Arrow maintains its all-male membership policy or face a termination of federal funds.

[3] After careful study, we now determine that the case law, including the *North Haven* decision, strongly supports our prior conclusion that Regulation 86.31(b)(7) is valid both on its face and as applied. Each and every federal program at the University is necessarily discriminatory as a result of Iron Arrow's relationship to the University. The discriminatory practices of the Society, by their nature and in light of the intertwined histories of Iron Arrow and the University, infect the entire academic mission of the University. In reaching this conclusion it is immaterial that federal funds are not directly earmarked to Iron Arrow itself. The effect of the program-specific requirements of *North Haven* is that, while the University as a whole is not subject to the prohibitions and sanctions of Title IX, each and

every program or activity at the University receiving federal assistance is so subject to the statute's strictures. We also find that the statutory language and the statute's pre-enactment and post-enactment legislative history bear out our conclusion that Congress intended that Title IX cover honor societies such as Iron Arrow.

B. *The North Haven Decision*

In *North Haven*, the Supreme Court upheld the validity of regulations that prohibit federally funded educational programs from discriminating in employment on the basis of gender. In applying this conclusion to the specific facts in the *North Haven* case, the Court noted that Title IX is "program-specific" both in its prohibition of gender discrimination and in its fund cutoff sanction. Thus, the Court left little doubt that Title IX applies to those programs or activities directly receiving federal funds.

The Court's decision, however, leaves open several questions for this Court. For example, the Court explicitly recognized that it did "not undertake to define 'program' . . ." 102 S.Ct. at 1927. Thus, may the term "program" encompass outside activities such as Iron Arrow if the activities are considered as programs of the University itself? Also, who falls within the definition of a "recipient" of federal funding? In addition, we still must determine the means by which federal funding may "benefit" a program that engages in discrimination.

C. *Analysis*

Appellants, on remand, contend that the program-specific language of *North Haven* requires the "tracing"

of federal money to a specific university program which then, in turn, benefitted Iron Arrow, for the University to be subjected to Title IX's sanctions. They argue that neither Iron Arrow nor the University has "kept one penny of federal financial assistance from being available to the women students at the University as much as to the male students there." Appellants rely on three cases, each dealing with sports programs at schools, to support their proposition that Title IX applies only to those programs receiving direct federal funding. Amicus, on the contrary, argues that the legislative history requires that the term "program or activity" be read broadly so as to include honorary societies. Amicus also relies on several cases which employ various theories to broaden the definition of "recipient" or "program" under Title IX.

North Haven provides a framework for the analysis of the scope of Title IX. In that case, the Court looked first to the language of the statute, then to the legislative history, both from before and since Title IX's enactment, and finally to the case law to determine if employment discrimination falls within the ambit of Title IX. We employ this same approach here.

1. *The statute*

We now have the benefit of the Supreme Court's ruling in *North Haven* that an agency's authority under Title IX both to promulgate regulations and to terminate funds is limited to the specific program or activity receiving federal financial aid. The statute fails on its own to define unambiguously the terms "program or activity" or "recipient." We therefore must turn to the

legislative history for a clearer understanding of the boundaries of these terms.

Nothing in the language of the statute itself, however, indicates that Iron Arrow's activities should not be attributable to the University and thus be subject to Title IX. We especially note that Congress did not limit its prohibition merely to discrimination in entrance to funded programs or to discrimination among actual participants in those programs. The language of Title IX sweeps far more broadly. In addition to the language, "excluded from participation in" and "subjected to discrimination under," Congress also used the broad phrase "be denied the benefits of." Not only does the word "benefit" allow for the prohibition of many subtle substantive forms of discrimination, the act of "denial" is so unspecific as to admit of a host of prohibited actions. We also believe it significant that Congress did not provide in the statute that the "education program or activity receiving Federal financial assistance" be the actual party which engages in the discriminatory act.

The statute also is revealing for the exceptions it contains.[10] These exceptions fall roughly into two classes. The first class excepts from Title IX's coverage the admissions policies of certain types of schools that do not admit students of one or the other sex or that admit only a limited number of male or female students. The second class excepts from coverage certain activities or organizations in otherwise covered schools. The existence of these exceptions is significant to

[10]*See* footnote 9.

understanding the scope of §901(a). Congress would not have provided such exceptions unless it believed that the activities or policies, in the absence of these exceptions, would otherwise have been covered. Thus, for example, *social* fraternities are specifically excepted from coverage, even without any clear indication of the direct federal funding they would receive.[11] Similarly, Congress felt it necessary to except certain admissions policies even though admissions programs are themselves rarely federally funded. These exceptions indicate Congress' contemplation of a broad reading of Title IX and its "program-specific" requirements that would apply to general and overriding features of all educational institutions.[12]

2. *Pre-enactment legislative history*

If the pre-enactment legislative history of Title IX reveals anything, it is that Congress did not expressly contemplate the type of problem that is before us today. Two factors are important in considering the pre-enactment legislative history of Title IX. First, Title IX was presented as a floor amendment so there is no informative committee consideration. Second, Title IX was explicitly modeled after and contains virtually identical language to sections 601 and 602 of Title VI of the Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 252, 42 U.S.C. §§2000d *et seq.*, which addresses race

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[11] *See Haffer v. Temple University*, 524 F.Supp. 531, 541, *aff'd* 688 F.2d 14 (3d Cir. 1982), where the court also relies on this argument.

[12] *See* section III, C, 3, on post-enactment legislative history, *infra*, for further discussion of these exceptions.

discrimination in all phases of federally funded programs, not merely in education. *North Haven*, 102 S.Ct. at 1922; *Cannon v. University of Chicago*, 441 U.S. 677, 694, 99 S.Ct. 1946, 1956, 60 L.Ed.2d 560 (1979); *Sex Discrimination Regulations: Hearings Before Subcommittee on Post Secondary Education of the Committee on Education and Labor*, House of Representatives, 94th Cong., 1st Sess. 16, at 150 ("[T]he setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI.") (Comments of Senator Bayh). ("Sex Discrimination Hearings.") Thus, the legislative history of Title VI is useful in understanding Congress' intent when it enacted Title IX, although we recognize that it is obviously, "Congress' intention in 1972, not 1964, that is of significance in interpreting Title IX." *North Haven*, 102 S.Ct. at 1922.

[4] The so-called "pinpoint" provision of section 602 of Title VI, which permits the cutoff of federal funds only in the federally supported program or activity that is actually found to be engaged in race discrimination, was designed to balance the need to prevent federal monies from being used to advance discrimination, *Lau v. Nichols*, 414 U.S. 563, 565, 94 S.Ct. 786, 788, 789, 39 L.Ed.2d 1 (1974), against the fear that fund cutoffs would be exercised in a vindictive or punitive manner. *E.g.* 110 Cong.Rec. 7062 (1964) (Comments of Senator Pastore). Several senators harbored this fear, especially with regard to fund cutoffs for segregated public school

systems.[13] They feared that funds to an entire state could be terminated if only a single school remained segregated and that innocent beneficiaries of federal funds would thus be adversely affected.[14] The need to pinpoint the termination of funds to the particular discriminating program was envisioned as an essentially geographic limitation, yet with broad applicability to prohibit the use of federal funds for discriminatory purposes.[15]

We note that Title IX's legislative history indicates that Congress explicitly contemplated coverage of at least one of the types of harms suffered by the women who originally complained to the Secretary. There is substantial evidence in the record that future employers often regard membership in Iron Arrow as a very

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[13]For a discussion of the history of the "pin-point" provision, *see generally, Board of Public Instruction v. Finch:* Unwarranted Compromise of Title VI's Termination Sanction, 118 U.Pa.L.Rev. 1113 (1970); Title VI, Title IX and the Private University: Defining "Recipient" and "Program or Part Thereof," 78 Mich.L.Rev. 608 (1980); Administrative Cutoff of Federal Funding under Title VI: A Proposed Interpretation of "Program," 52 Ind.L.J. 651 (1977); Federal Aid to Higher Education: the Challenge to Fraternal Freedom of Association, (1966) Wis.L.Rev. 1252; HEW's Regulations under Title IX of the Education Amendments of 1972: Ultra Vires Challenges, 1976 Brigham Young University L.Rev. 133 (1976).

[14]*See, e.g.* 110 Cong.Rec. 8507-08 (1964) (Comments of Senator Smathers) (Title VI, "would punish a whole area, a whole state, a whole group, because of the sins of one.").

[15]*See, e.g.*, 110 Cong.Rec. 11942 (1964) (Comments of Attorney General Kennedy); *id.* at 7063 (Comments of Senator Pastore); *id.* at 6067 (Comments of Senator Ribicoff); *id.* at 8979-80 (Comments of Senator Humphrey).

(Footnote continued on next page)

desirable attribute. Senator Bayh, Title IX's sponsor, noted the effect of educational opportunities on future employment. He identified the need for a, "fair chance [for women] to secure the jobs of their choice . . .," 118 Cong.Rec. 5808 (1972), as a significant motivation for enacting Title IX.

In sum, Title IX's pre-enactment legislative history is inconclusive with respect to whether Congress actually

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(Footnote 15 Continued)

The breadth of congressional concern is indicated by the following list of abuses of federal funds towards which Title VI was aimed:

> The Federal Government pays more than ninety-five percent of all National Guard operating funds, yet eleven states still require segregation in their Guard units.
>
> The Federal Government gives the State of Mississippi about two million dollars a year for its public schools, yet every public school in the State continues to be segregated ten years after the Supreme Court school decision.
>
> The Federal Government spent seven hundred fifty million dollars on research projects in 1960, yet in seven States forty-three percent of all National Institutes of Health grants and forty-one percent of all grants by the Atomic Energy Commissioner went to public universities and research centers that do not admit Negro students.
>
> State public offices are financed one hundred percent by the Federal Government, nevertheless many offices maintain separate buildings, separate waiting rooms and separate job lists.

110 Cong.Rec. 7711 (1964) (Quoting from Leadership Conference on Civil Rights).

envisioned imputing the practices of "outside organizations" to federal fund recipients. The history does indicate two general principles. First, that in limiting an administrator's authority to cut off federal funds, Congress was concerned about abuses of the termination sanction that are very different from the Secretary's actions in the instant case. Thus, there is no indication that the "pinpoint" provision was designed to prohibit the Secretary from pursuing the type of sanctions he seeks to impose in this case. Second, Congress clearly intended that Title VI's and Title IX's prohibitions apply whenever federal funds bestow a benefit in a discriminatory manner. Included amongst those benefits are equal employment opportunities for women as a result of equal educational opportunities.

3. *Post-enactment legislative history*

Title IX's post-enactment legislative history offers significant insight to the problem we face. Several amendments and proposed amendments, as well as formal consideration of the HEW regulations, confirm Congress' desire to ban discrimination in those honor societies with an adequate nexus to universities receiving federal funds.

HEW published its final Title IX regulations on June 4, 1975. The Secretary submitted these regulations to Congress for review pursuant to section 431(d)(1) of the General Education Provisions Act, Pub.L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. §1232(d)(1). This "laying before" provision was designed to afford Congress an opportunity to examine the regulation and, if it found the regulation "inconsistent with the Act from which it derives its authority . . .," to disapprove it in

a concurrent resolution. If no such disapproval was adopted within 45 days the regulation would become effective.[16]

Two resolutions of disapproval were introduced in the Senate, but neither was acted upon. *See* 121 Cong.Rec. 17300 (1975) and *id.* at 22940. One of these, Senate Concurrent Resolution 46 proposed by Senator Helms, would have disapproved regulations applying Title IX to programs and activities not directly receiving federal funds. The resolution was not reported out of committee. Similarly, the House failed to pass concurrent resolutions of disapproval. *See* 121 Cong.Rec. 21687. Congress thus failed to register its dissatisfaction with the regulations in question in this case.

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[16]This 45 day period had already run by the time that Congress amended 20 U.S.C. §1232(d)(1) to provide that:

> Failure of the Congress to adopt such a concurrent resolution with respect to any such final regulation prescribed under any such Act, shall not represent, with respect to such final regulation, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.

Section 8(a)(b) of Public Law 94-142 provides that section 7(b), which amended 20 U.S.C. §1232(d)(1), was to take effect on November 24, 1975. While the failure of resolutions of disapproval in the absence of this amendment cannot be read to mean that Congress explicitly approved the new regulations or explicitly found them to be consistent with Title IX, we note that many members of Congress were obviously aware that their actions indeed would be construed as an implicit finding of consistency.

As the Supreme Court in *North Haven* noted, "[T]he relatively insubstantial interest given the resolutions of disapproval that were introduced seems particularly significant since Congress has proceeded to amend section 901 when it has disagreed with HEW's interpretation of the statute." 102 S.Ct. at 1924 (footnote omitted).

Five attempted amendments to Title IX merit our careful attention. These amendments reveal that Congress contemplated the problem of Title IX's coverage of outside organizations, including honor societies such as Iron Arrow, and that Congress did not act to prevent such an extension of HEW's authority under Title IX. In the only one of these five proposed amendments actually adopted, Congress amended Title IX, even before it reviewed HEW's regulations, to except social fraternities and sororities and voluntary youth service organizations from the reach of section 901(a). Pub.L. 93-568, §3(a), 88 Stat. 1862 (1974). Senator Bayh, the sponsor of the amendment, emphasized that:

> This exemption covers only social Greek organizations; it does not apply to professional fraternities or sororities whose admission practices might have a discriminatory effect on the future career opportunities of a woman.

120 Cong.Rec. 39992 (1974).

This amendment clarifies two aspects of Congress' thinking.[17] First, it is strong evidence that Congress

[17]It is useful to note, in divining Congress' intent by examining a post-enactment amendment to a statute, the substantial continuity of membership from the 92nd to the 94th Congress. *See* 1976 Brigham Young U.L.Rev. 133.

intended that Title IX apply to outside organizations such as Iron Arrow, which might affect the post-graduation employment opportunities of women. Second, it is difficult to imagine, except in a very few cases where a fraternity or sorority might occupy a house in which construction was paid for in some part by federal funds, any sort of direct federal aid such an organization could receive. Yet this fact did not deter Congress from believing that, unless fraternities and sororities were specifically excepted from the coverage of Title IX, their discriminatory admissions policies would fall within the ambit of section 901(a).[18]

In 1975, Senator Helms attempted to limit explicitly Title IX's coverage to educational programs and activities directly receiving federal financial assistance. S.2146, 121 Cong.Rec. 23845 (1975). Congress declined to pass this amendment. In 1976, Senator McClure similiarly

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[18]*See Haffer*, 524 F.Supp. at 541 ("Logic supports a broad reading of Title IX and supports upholding the validity of the regulations. Congress explicitly amended Title IX to exclude social fraternities and sororities from its coverage. I cannot imagine what possible federal funds could have been earmarked for these programs. If such indirectly (if at all) benefited programs were never intended to be covered by Title IX, it is inexplicable that Congress felt the need to exempt them specifically on another basis.")

We emphasize at this point that Congress was well aware that these social fraternities or sororities might only receive *indirect* federal funding. In the course of the amendment's debate, Senator Bayh stated that, "Most of these fraternal organizations could not continue to exist without this kind of *indirect* financial assistance from the colleges and universities. . . ." 120 Cong.Rec. 3992 (1974) (emphasis added).

attempted to define federal financial assistance as assistance received directly from the federal government. Amendment 390, 122 Cong.Rec. 28144 (1976). The Senate defeated this amendment. Senator McClure also attempted to amend section 901 to limit the meaning of "educational program or activity" to such "as are curriculum or graduation requirements of the institutions." Amendment 389, 122 Cong.Rec. 28136 (1976). This amendment arguably would have placed Regulation 86.31(b)(7) beyond the Secretary's authority under Title IX. The Senate, by a vote of 52 to 28, declined to so limit the scope of Title IX's prohibitions. 122 Cong.Rec. 28147 (1976).

In 1976, Representative Mathis unsucessfully attempted to broaden an amendment containing certain exceptions to Title IX, specifically sections 901(a)(6) to (9),[19] by also excepting professional fraternities and sororities from the coverage of Title IX. In response to inquiry on the scope of his proposed amendment, Representative Mathis clearly stated that honorary societies would remain subject to Title IX. 122 Cong.Rec. 13535 (1976). In addition, several other representatives strongly denounced the policy behind Representative Mathis' proposed amendment and noted that the discriminatory membership practices of such societies were among the abuses Title IX was designed to remedy. See 122 Cong.Rec. 13535-36 (1976).

These numerous attempts to alter Title IX's scope of coverage reveal that Congress was well aware that Title IX would be construed to prohibit discriminatory

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[19]See footnote 9, *supra*.

membership practices among honor societies such as Iron Arrow. We take these expressions of Title IX's scope as authoritative, in light of the recent language of the Supreme Court in *North Haven* that:

> Although postenactment developments cannot be accorded "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX . . . ." *Cannon v. University of Chicago*, 441 U.S., at 687, note 7 [99 S.Ct. at 1952, note 7]. Where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States v. Rutherford*, 442 U.S. 544, 554, noted 10 [99 S.Ct. 2470, 2476, note 10, 61 L.Ed.2d 68] (1979), quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 [60 S.Ct. 982, 989, 84 L.Ed. 1311] (1940). . . .

102 S.Ct. at 1925.

4. *The relevant case law*

The relevant case law strongly supports our prior finding that the Secretary acted within his authority when he issued Regulation 86.31(b)(7) and when he determined that the University is subject to a cutoff of federal funding due to its relationship with Iron Arrow. In reaching this decision, we rely primarily upon the

case of *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068 (5th Cir.1968), by which we are bound.[20] In *Finch*, the former Fifth Circuit interpreted the term "program" in section 602 of Title VI to mean the use of federal funds under an individual grant statute by which the school received aid to remedy specific areas of educational need. 414 F.2d at 1078.[21] The court held that a general finding of discrimination in the operation of an elementary and secondary school system is insufficient for the termination of all federal funding to that system because, "the termination power reaches only those programs which would utilize federal funds for unconstitutional ends." 414 F.2d at 1078. The Court found that HEW must make a finding of discrimination in the operation of each program funded by a particular statute before cutting off federal funds.

The *Finch* court went on to recognize that the policy of Title IX mandates the broad and flexible application of the fund cutoff provisions:

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[20]The case law of the former Fifth Circuit Court of Appeals has been adopted by the Eleventh Circuit Court of Appeals as binding precedent unless and until overruled or modified by this Court sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981).

[21]This interpretation is applicable to Title IX because of the virtually identical language of that statute. *See North Haven*, 102 S.Ct. at 1922 ("the meaning and applicability of Title VI are useful guides in construing Title IX, therefore, only to the extent that the language and history of Title IX do not suggest a contrary interpretation."); *Cannon v. University of Chicago*, 441 U.S. at 697-98, 99 S.Ct. at 1958.

> We conclude with a word of caution. In finding that a termination of funds under Title IV (sic) of the Civil Rights Act must be made on a program by program basis, we do not mean to indicate that a program must be considered in isolation from its context. To say that a program in a school is free from discrimination because everyone in that school is at liberty to partake of its benefits may or may not be a tenable position. Clearly the racial composition of a school's student body, or the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to this possibility, the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.

414 F.2d at 1078-79. Thus, under the standards set out by the Court, if federal funds, "support a program which is infected by a discriminatory environment, then termination of such funds is proper." 414 F.2d at 1078.

[5] We hold, therefore, that the existence of the all-male Iron Arrow Honor Society as the most prestigious honorary-recognition society at the University has a pervasive discriminatory effect upon women in all of the University's academic programs, federally funded or not. All federal programs at the University of Miami

are necessarily infected by what amounts to a general and overriding policy of the University. This infection results from the University's close historical ties with Iron Arrow.

The Supreme Court has recognized that, "[a] sense of inferiority affects the motivation of a child to learn." *Brown v. Board of Education*, 347 U.S. 483, 494, 74 S.Ct. 686, 691, 98 L.Ed 873 (1954). Two factors aggravate this concern with respect to Iron Arrow. First, evidence indicates that a central tenet of the Society's philosophy is the public peer recognition that membership should command. The obviousness of Iron Arrow's ceremonies, such as its "tapping" or the tradition that new initiates wear certain Indian jackets, insures that all members of the campus community are aware upon whom the honor of membership has been bestowed. Second, Iron Arrow's membership is not limited to students, but also includes alumni, staff, faculty members, and university administrators. Thus, the suggestion that the contributions, efforts, and achievements of women can never rise to the level of male accomplishments on campus necessarily infects the academic atmosphere of the entire University. We are unable to imagine a single federal program which, even though on its face administered in a non-discriminatory manner, escapes the taint of this discrimination.

It is precisely because Iron Arrow purports to represent the best at the University in terms of achievement and because it in fact commands so much respect among members of the campus community that the effects of the Society's discriminatory practices are so pervasive and so pernicious. We are disturbed that the University community, which in theory premises

relations among its members upon the free and vigorous interplay of ideas, should classify and stigmatize the quality of those ideas solely because of the sex of their author, whether male or female.[22]

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[22]Consider, for example, a woman chemistry professor who secures a federal contract to support her research and hires several graduate students as assistants. In such a program, which is not directly related to teaching, the motivation of this professor in conducting her research and the motivation of her female research assistants may be adversely affected, in a subtle manner, because they know that the University community will never formally recognize and accept, through the mechanism of the Iron Arrow Society, that their work is of the same quality as that of male students or faculty.

In our previous opinion, we noted that:

> While we do not reach the ultimate question as to what, if anything, would be done by the University to completely withdraw assistance from Iron Arrow in order to bring itself into compliance without abandoning its males-only policy, we conclude that we are unable to imagine any continued association with the University of Miami that, in light of its history, would not constitute a continuation of the "substantial assistance" which the trial court found to exist.

652 F.2d at 448. In light of this statement, and since in any federal contract a school captures some portion of the funds to support its overhead, including the central administration and very often expenses such as student activities, Iron Arrow benefits from the federal support that the Office of the President directly received as a result of the allocation of overhead from federal contracts. Because of our broader holding that each federally assisted program at the University is necessarily discriminatory, it is unnecessary for us to determine the impact of Title IX's program-specific sanctions upon the direct federal support from overhead received by general administrative entities such as the University's Office of the President.

In its *North Haven* decision, the Supreme Court quotes approvingly from HEW's Title IX regulations and from the *Finch* decision, upon which we rely. The Supreme Court stated that:

> The Department [HEW] recognized that section 902 limited its authority to terminate funds to particular programs that were found to have violated Title IX, and it continued:
>
> > "Therefore, an education program or activity or part thereof operated by a recipient of federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in Title VI, which holds that Federal funds may be terminated under Title VI upon a finding that they are 'infected by a discriminatory environment . . .' *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068, 1078-79 (5th Cir.1969)." 40 Fed.Reg. 24128 (1975).
>
> By expressly adopting the Fifth Circuit opinion constructing Title VI as program-specific, HEW apparently indicated its intent that the Title IX regulations be interpreted in like fashion. So read, the regulations conform with the limitations Congress enacted in sections 901 and 902.

102 S.Ct. at 1927 (footnote omitted).

[6] Thus, we find that the Supreme Court's opinion in *North Haven* directly supports our broad reading that the program-specific prohibition of Title IX applies when a discriminatory program is "benefitted" by federal financial assistance or when a federally assisted program itself is infected by a discriminatory environment.[23]

In assessing the impact of Iron Arrow's male-only policy upon the University community, we are of the belief that its effect upon women is most analogous to that of a discriminatory admissions policy at an educational institution. While a discriminatory admissions policy precludes women from all of the benefits of educational programs, Iron Arrow's practices more subtlely undermine the self-worth of women who participate in these programs. Both, however, share the same general pervasive effect upon a university community and neither Iron Arrow nor an admissions program is usually the direct recipient of federal dollars. Since many courts

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[23]Congress explicitly relied upon the same language from the *Finch* decision when it reviewed the HEW regulations for their consistency with Title IX. See Sex Discrimination Hearings at 188-89.

We also note the need to defer to agency expertise in construing a statute when that agency is charged with the statute's administration. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, [1761-62] 40 L.Ed.2d 134 (1974); Sands, 2A Sutherland's Statutes and Statutory Construction, §49.05 at 238 (4th ed. 1973). While the Supreme Court in *North Haven* recognized the same principle, the Court did not rely on this analysis because of the agency's fluctuating interpretations of the employment portion of HEW's regulations. See 102 S.Ct. at 1927, n. 29. Since the Secretary has consistently applied Regulation 86.31(b)(7), we do not face a similar restriction in relying upon the agency's interpretation.

and Congress have consistently condemned discriminatory admissions policies,[24] we adopt their analyses in further support of our conclusion.

Title VI originally proscribed racial discrimination in higher education only with respect to admissions. 42 U.S.C. §2000c6(a)(2) (1964). A college student was protected from discrimination only if he or she was denied admission or was not permitted to continue attending a public college. Discriminatory facilities, such as segregated dormitories or classrooms, were not by themselves grounds for action unless they rose to the level of an admissions decision by forcing the student to discontinue attendance at a school. See 1966 Wis.L.Rev. 1252, 1256.

Congress extended its concern with admissions to cases of sex discrimination when it adopted Title IX. During Congressional evaluation of HEW's regulations, Senator Bayh, Title IX's author, forwarded a legal opinion which reveals that Congress was well aware of the interpretation we impart to HEW's Regulation. The opinion stated that admissions and similar policies of a general pervasive nature "unavoidably" infect each assistance program or activity and are thus covered by Title IX:

> The proposed regulations arguably reflect a position on the part of the agency that, for purposes of determining compliance, the educational activities of institutional recipients

[24] *See* note 9, *supra*, for Title IX's exceptions to prohibitions against discriminatory admissions. These exceptions are due to historical concerns and do not undermine our general discussion about admissions, which follows.

> may, where general admissions policies are concerned, be viewed as an individual entity. Where less pervasive forms of discrimination are involved, however, the regulations seem to contemplate a program by program approach to coverage. . . . Whole fund cutoffs . . . are apparently limited by the regulations, however, to cases involving admissions policies or other pervasive practices affecting all assisted programs or activities conducted by the institution.[25] Letter to Honorable Birch Bayh from Barbara Dixon, American Law Division, Library of Congress, Dec. 20, 1974, Sex Discrimination Hearings at 188-91.

Courts adopting a narrow reading of the programmatic prohibitions of Title IX consistently have conceded the inapplicability of their analysis to an institution's pervasive practices that go beyond discrete academic or non-academic programs, when they have addressed the issue. For example, in *Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928, 102 S.Ct. 1976, 72 L.Ed.2d 444 (April 20, 1982), the court dismissed appellant's complaint alleging sex discrimination in the awarding of grades and other matters at Harvard Law School. The court held that the appellant failed to allege discrimination in any specific federally funded programs and that the educational institution itself could not be

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[25]While we do not rely on all aspects of the reasoning of the quoted opinion, because we do not explicitly find that the institution as a whole is the relevant program or entity, we note that the opinion placed before Congress the same "pervasive practice" theory which we embrace.

interpreted as the "program" under Title IX. Yet the *Rice* court noted that a different result would obtain if a pervasive policy such as admissions was challenged. The court stated, "One who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted." 663 F.2d at 339, n. 2.

Similarly, in *Hillsdale College v. HEW*, 696 F.2d 418 at 428-29 (6th Cir.1982), a case in which students' receipt of federal loans and grants was held to subject only the student loan and grant program itself and not the entire school to Title IX's prohibitions, the court distinguished the case of *Bob Jones University v. Johnson*, 396 F.Supp. 597 (D.S.C.1974), *aff'd* 529 F.2d 514 (4th Cir.1975), on its facts.[26] The *Hillsdale College* court argued that the *Bob Jones* court did not have to face squarely the institutional/programmatic conflict because the *Bob Jones* case involved race discrimination respecting admissions, which tainted all programs and activities within that institution rather than merely a single program at the school. Other courts have made this same distinction. See *Othen v. Ann Arbor School Board*, 507 F.Supp. 1376, 1387 (E.D.Mich.1981), affirmed 699 F.2d 309 (6th Cir.1981); *University of Richmond v. Bell*, 543 F.Supp. 321 (E.D.Va.1982).

At this point, it is important to emphasize that we do not rely on what has come to be known as the

[26]The *Bob Jones* court held that Bob Jones University is subject to the race discrimination ban of Title VI, 42 U.S.C. 2000d *et seq.*, even though it did not receive any direct federal funding, because several of its students received Veterans Administration benefits that were applied to pay tuition at the school.

"benefit theory" or the "institution as program" cases.[27] The "benefit theory" focuses on the type of assistance and argues that federal funds to one program may subject another program to Title IX because these funds "free up" institutional funds for use in non-directly funded discriminatory programs. The related "institution as program" cases focus on the definition of "program" or "recipient" and hold that the entire educational institution may be defined as the program receiving federal assistance for the purposes of Title IX. These theories arise most frequently where student financial aid is used as a device to subject an institution to the proscriptions of Title IX or where a school's athletic programs are allegedly discriminatory. *E.g., Bob Jones; Grove City College v. Bell*, 687 F.2d 684 (3d Cir.1982), *cert. granted*, ____U.S.____, 103 S.Ct. 1181, 74 L.Ed.2d ____ (1983); *Haffer v. Temple University*, 688 F.2d 14 (3d Cir.1982), *affirming* 524 F.Supp. 531 (E.D.Pa.1981); *Wright v. Columbia University*, 520 F.Supp. 789 (E.D.Pa.1981) (handicap discrimination under § 504 of Rehabilitation Act); *Poole v. South Plainfield Board of Education*, 490 F.Supp. 948 (D.N.J.1980) (handicap discrimination under § 504 of Rehabilitation Act). *Contra, Hillsdale College; University of Richmond; Bennett v. West Texas State University*, 525 F.Supp. 77 (N.D.Tex.1981), *reversed*, 698 F.2d 1215 (5th Cir. 1981). We note the careful distinction which must be drawn

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[27]Our non-reliance, of course, should not be taken to indicate our disapproval of these approaches. Nor should our holding, that the discriminatory practices of outside organizations affecting a central and overriding aspect of a university's academic mission are properly attributable to the university itself, be construed as an implicit ruling that practices involving less crucial issues automatically fail to subject a university to Title IX's sanctions.

between the statement that an educational program may be *defined* as an educational institution for purposes of Title IX and the portion of our holding which states that Iron Arrow's practices, because of their centrality to the University's academic mission and the close historical ties between the Society and the University, are *attributable* to the University itself.

Finally, we find that those cases upon which appellants rely for the proposition that the Secretary must directly "trace" federal funds to Iron Arrow to subject the University to Title IX are factually inapposite. *See Othen; University of Richmond; Bennett.* These cases generally deal with the applicability of Title IX to athletics; hence they concern discrete programs which do not affect the entire academic structure of the University.

IV. CONCLUSION

Education is a unique force in our society for eliminating the effects of past discrimination. Thus, discrimination in education should be examined with a particularly searching light. Congress has determined that no person shall, on the basis of sex, be denied the benefits of or be subjected to discrimination in federally assisted education programs or activities. As the recent *North Haven* case made clear, this ban is restricted to federally funded programs or activities. Yet the net of benefits provided by such activities is cast widely, and the possible discriminatory acts and effects which may subject a program to Title IX's cutoff sanctions are consequently broad.

In this case, Iron Arrow's unique historical affiliation with the University of Miami constitutes "substantial assistance," albeit non-tangible, which subjects the University to termination of federal funds. This is so because the all-male honor society, in light of its renowned reputation, by its very existence unavoidably and necessarily taints each and every federally assisted program at the University. Thus, while the University itself may believe it is acting in a non-discriminatory manner, the effect of Iron Arrow's discriminatory practices is such that all the University's programs and activities are, in the end, discriminatory. The practices of Iron Arrow, therefore, are properly attributable to the University for purposes of determining compliance with Title IX.

Since we find that this case continues to present a live controversy, we deny appellees' Suggestion of Mootness and Motion for Remand. Since we also find that the Supreme Court's decision in *North Haven*, because of its reliance upon *Board of Public Instruction v. Finch*, not only permits our approving the Secretary's actions, but compels such a result, and because we also find that the language of Title IX and its legislative history support this conclusion, we reinstate our prior decision in this case, 652 F.2d 445 (5th Cir. 1981), that Reg. 86.31(b)(7) is within the scope of the Secretary's authority under Title IX both on its face and as applied. We again affirm the district court's denial of appellants' request for an injunction.

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent. I would remand the case to the district court for a determination of whether there continues to be a case or controversy in this case. The Women's Commission of the University of Miami filed an amicus curiae brief stating that it considers and reviews "the policies, procedures and attitudes which affect the status of women at the University of Miami, and [makes] recommendations to improve the status of women." Although the brief supports the appellee's position and the conclusion of the majority on the merits, the first point made therein is that "the action should be dismissed because this case no longer presents a justiciable case or controversy within the meaning of Article III of the U.S. Constitution." Following is an excerpt of the amicus brief which argues the point:

> During the pendency of this appeal, the University of Miami has categorically stated that regardless of the outcome of these proceedings, Iron Arrow may not associate with the University of Miami unless it registers as a "student organization." To be recognized as a student organization at the University, Iron Arrow must adopt a policy of nondiscrimination on the basis of sex, and therefore must admit female and male members.
>
> As a result of this independent decision by the University of Miami, this Court can no longer accord Iron Arrow the relief it seeks in this action against the Secretary. Regardless of how this Court rules on the scope and coverage of Title IX, and even if it were to hold that consonant with Title IX Iron Arrow could return to the campus with its sex-discriminatory

practices intact, Iron Arrow would be unable to do so. Therefore, this case is now moot and should be dismissed.

Moreover, the exception to the mootness doctrine for allegedly illegal actions "capable of repetition yet evading review," has no application here. *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 [31 S.Ct. 279, 55 L.Ed. 310] (1911). This exception is limited to situations where the action under challenge is too short in duration to be fully litigated before it expires or ceases. *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765 [98 S.Ct. 1407, 55 L.Ed.2d 707] (1978) (restrictions on candidacy or participation in state elections); *Sosna v. Iowa*, 419 U.S. 393 [95 S.Ct. 553, 42 L.Ed.2d 532] (1975) (durational residency requirements); *Roe v. Wade*, 410 U.S. 113 [93 S.Ct. 705, 35 L.Ed.2d 147] (1973) (anti-abortion statute). In such cases there must also be a reasonable expectation that the same plaintiff would be subject to the same action again. *Weinstein v. Bradford*, 423 U.S. 147 [96 S.Ct. 347, 46 L.Ed.2d 350] (1975). Clearly, this is not the kind of case where there might be insufficient time for a live controversy to be fully litigated. Nor is there any reason to believe that Iron Arrow will be the subject of future action by the Secretary, because the University has independently adopted a policy in full accord with the Secretary's position.

(footnotes omitted)

The defendant Department of Education has likewise filed a suggestion of mootness and a motion to remand. That brief also suggests that the University of Miami may have now changed its position so that, based on its own non-discrimination policy, the University will not permit Iron Arrow to return to campus unless it agrees to admit women and that this policy applies irrespective of the Department of Education's enforcement efforts. The Government reminds us that the initial question in this litigation was the standing of Iron Arrow to bring the suit against the federal agency. The case was initially dismissed for lack of standing. This Court reversed in light of the "unequivocal statement of the position of the University of Miami that but for the action of the Secretary of Health, Education and Welfare, it would not have barred and would not in the future bar the Iron Arrow Honor Society from its campus." *Iron Arrow Honor Society v. Califano*, 597 F.2d 590, 591 (5th Cir. 1979).

The Government today appropriately argues that a change in the University's position would moot Iron Arrow's grievance against the Government defendant. The brief argues:

> [A]t the outset of this litigation, Iron Arrow satisfied the personal stake requirement. Iron Arrow's inability to perform its functions on campus plainly constituted sufficient injury in fact. Although this injury was directly attributable to the University's decision to expel Iron Arrow from campus, the University had stated that this decision was based entirely upon HEW's threat of enforcement and that but for this threat the University would permit

> Iron Arrow to return to campus. In these circumstances, Iron Arrow's injury could fairly be traced to HEW's conduct and would likely be redressed by a favorable decision.

It then argues that if indeed Iron Arrow will not be permitted to return to campus because of the University's non-discriminatory position, then

> Iron Arrow's injury would be attributable solely to the University's independent decision to keep Iron Arrow off campus, whatever position may ultimately be taken by the Department of Education. In such circumstances, Iron Arrow no longer would have a sufficient stake in the outcome of this litigation to satisfy Article III and the case should be dismissed as moot.

These arguments compel a remand to the district court to determine the present position of the University with respect to Iron Arrow's campus activities, as determined by the Board of Trustees, and perhaps just as importantly to determine the position of the Department of Education in light of the University's position and the Supreme Court's decision in *North Haven Board of Education v. Bell*, 456 U.S. ____, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). There is a possibility that the plaintiff and the defendants are in agreement on both the law and the facts in this lawsuit. The Government's brief does not directly confront the merits, but suggests the following in a footnote:

> Prior to the Supreme Court's decision in *North Haven*, the Department took the position that University "assistance" to Iron Arrow of

a nonfinancial nature was sufficient to invoke Title IX coverage under the "significant assistance" regulation. *North Haven* casts considerable doubt on that analysis, however, by holding that the validity of regulations promulgated under Title IX depends on "the program-specific limitation of §§901 and 902" (50 U.S.L.W. at 4507 [102 S.Ct. at 1926]). The lower federal courts of appeals are divided over the proper reach of the statute to wholly non-funded educational programs or activities where some federal financial assistance goes to the university. Compare *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, [456 U.S. 928, 102 S.Ct. 1976, 72 L.Ed.2d 444] 50 U.S.L.W. 3838 (U.S. April 20, 1982) with *Haffer v. Temple University*, 688 F.2d 14 (3d Cir. 1982), relying on *Grove City v. Bell*, 687 F.2d 684 (3rd Cir. 1982), petition for cert. filed Nov. 9, 1982 (S.Ct. No. 82-792). See also the well-reasoned decision in *University of Richmond v. Bell*, 543 F.Supp. 321 (E.D. Va. 1982).

The decision by this Court only permits the Government to enforce its regulations as it interpreted them at the time of this suit, and does not require the Government to adhere to that interpretation.

Although the court's opinion recites that Iron Arrow vigorously opposed the motion of the Government to remand for a determination of mootness, the thrust of Iron Arrow's position was to have this Court, at the appellate level, decide issues which should first be decided by the trial court. Iron Arrow concedes that

this case may now be moot, depending upon the present position of the University and the Government. It requests this Court to require the University and the Government to file pleadings on the issues in this Court, and thereafter determine whether the case is moot.

The cases concerning the proposition that voluntary discontinuance of illegal activity does not operate to remove the case from the ambit of judicial power are conceptually inapplicable. The University is not a party and not the object of injunctive relief. The Government has not tried to render an injunction unnecessary by discontinuing illegal activity. The facts have changed so that the Government may well decide not to withhold funds, regardless of Iron Arrow's position as to whether it can or can not, and regardless of what a federal court might order.

In sum, it appears that the Court has reached out to decide a difficult legal issue that may well have an effect on other parties in a case where it has no effect on the present parties.

On the merits, I would simply vacate our prior opinion and remand to the district court to reconsider in the light of *North Haven*. Assuming they are inclined to do so, the parties ought to have a full chance to litigate the facts of this case as they apply to the law in light of that decision and its reference to "the program-specific" limitations of §901 and §902. In my judgment, the record in this case simply does not permit a decision on the effect of *North Haven* on this case.

I would remand to the district court for consideration of mootness, and if there is still a case or controversy,

to decide the merits on the facts as they may be found in relation to the "program-specific" gloss on §901 and §902, and on the regulations as they may now be interpreted by the Government in the light of *North Haven*.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 28, 1982

Ms. Elizabeth J. du Fresne
1782 One Biscayne Tower
Two South Biscayne Boulevard
Miami, FL 33131

Re: Iron Arrow Honor Society, etc.,
v. Richard S. Schweiker, Secretary,
Department of Health and Human Services,
et al.
No. 81-835

Dear Ms. du Fresne:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of North Haven Board of Education v. Bell, 456 U.S. ____ (1982). Justice Brennan, Justice White, Justice Marshall and Justice Blackmun dissent.

Very truly yours,

/s/ Alexander L. Stevas
Alexander L. Stevas, Clerk

No. 81-835. Iron Arrow Honor Society, etc., Petitioner v. Richard S. Schweiker, Secretary, Department of Health and Human Services, et al.

June 28, 1982. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of North Haven Board of Education v. Bell, 456 US ____, 72 LEd2d 299, 102 SCt 1912 (1982). Justice Brennan, Justice White, Justice Marshall and Justice Blackmun dissent.

Same case below, 652 F2d 445.

IRON ARROW HONOR SOCIETY, a "tap" or recognition association for men, et al.,
Plaintiffs-Appellants,

v.

Richard S. SCHWEIKER, Secretary of the Department of Health and Human Services, et al.,
Defendants-Appellees.

No. 80-5663.

United States Court of Appeals,
Fifth Circuit.
Unit B

Aug. 3, 1981.

Honor society brought action seeking to enjoin Department of Health, Education and Welfare from issuing or interpreting regulation in such way as to deter university from permitting society to conduct certain functions on university campus, and seeking also declaration of rights. On remand, after previous appeal, 597 F.2d 590, the United States District Court for the Southern District Florida, at Miami, Eugene P. Spellman, J., 499 F.Supp. 496, entered judgment from which the society appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) regulation under which HEW threatened termination of substantial contribution of federal funds to University of Miami on ground that university had given substantial assistance to honorary recognition society which elected only men to membership was proper as effectuating provisions

of civil rights statute and was consistent with achievement of objectives of the statute authorizing the financial assistance in connection with which the action was taken, and (2) where it was clear that honorary recognition society of university could not exist without university, there was "substantial assistance" from university to society, and injunctive relief was properly refused against threatened termination of substantial contribution of federal funds from HEW to university.

Affirmed.

1. Colleges and Universities —4

Regulation under which former Department of Health, Education and Welfare threatened termination of substantial contribution of federal funds to University of Miami on ground that university had given substantial assistance to honorary recognition society which elected only men to membership was proper as effectuating provisions of civil rights statute and was consistent with achievement of objectives of the statute authorizing the financial assistance in connection with which the action was taken. Education Amendment of 1972, §§901 et seq., 902, 20 U.S.C.A. §§1681 et seq., 1682.

2. Civil Rights —9.5

Where it was clear that honorary recognition society of university could not exist without university, there was "substantial assistance" from university to society, which elected only men to membership, and injunctive relief was properly refused against threatened termination of substantial contribution of federal funds from former

Department of Health, Education and Welfare to university. Education Amendments of 1972, §§901 et seq., 902, 20 U.S.C.A. §§1681 et seq., 1682.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, RONEY and ANDERSON, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from the judgment of the trial court, 499 F.Supp. 496, dismissing a complaint seeking an injunction to forbid the former Department of Health, Education and Welfare from terminating its substantial contribution of federal funds to the University of Miami. The termination threat arose from the fact that Iron Arrow is an honorary-recognition society of the University which elects only men to membership and which the Secretary of HEW had determined gave "substantial assistance" to Iron Arrow.

There are two substantial questions raised by the Society which must be resolved on this appeal: 1) Were the HEW regulations upon which the Secretary acted in excess of the authorization contained in the statute; and 2) Did the University actually contribute "substantial assistance" to the Society?

The regulation in effect at the time of the threatened cutoff of federal funds from the University was Section 86.-31(b)(7) which provides that:

> Except as provided in this subpart, and providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: . . .
>
> (7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.

Statutory jurisdiction for the issuance of the regulation is 20 U.S.C. §1682. It authorizes certain federal agencies, including HEW to issue regulations to "effectuate" the provisions of §1681.[1] The enforcement provisions of §1682 provide:

> Compliance with any requirement adopted pursuant to this section may be effected 1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the . . . recipient as to whom such a finding has been made, and shall be limited in its effect

---

[1] Title IX provides in pertinent part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

20 U.S.C. §1681.

to the particular program, or part thereof, in which such noncompliance has been so found . . . .

20 U.S.C. §1682.

The Secretary explained the import of the regulation in the following manner:

> Section 86.31(b)(7) prohibits a recipient from assisting another party which discriminates on the basis of sex in serving students or employees of that recipient. This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself. (Under §86.6(c), a recipient's obligations are not changed by membership in any league or other organization whose rules require or permit discrimination on the basis of sex).

39 Fed. Reg. 22229 (1974).

The effect of this interpretation of the regulation is to say that although any cutoff of funds is normally

to be limited to the program or activity of the recipient in which the discrimination occurs, a different standard applies where the recipient gives substantial assistance to what is called by the parties an "outside" organization in which event the Secretary is to consider the substantiality of the relationship between the University and the other party and whether the other party's activities relate so closely to the University's educational program or activity, or to students or employees in that program, that these activities of the University itself. In such event, the regulation would permit the cutoff of federal funds to the University.

[1] We conclude that this regulation clearly "effectuates" the provisions of §1681 with respect to its programs and activities and that it is "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which" the action is taken. As this Court has said in *Coca-Cola Co. v. Atchison T. & S.F.Ry.*, 608 F.2d 213, 222 (5th Cir. 1979): "Courts generally grant 'great deference' to an agency's interpretation of its enabling statute." *See also Dougherty Co. School System v. Harris*, 622 F.2d 735, 737 (5th Cir. 1980) where we stated that the Secretary is entitled to "great latitude" in effectuating Title IX, 622 F.2d 735, 737 (5th Cir. 1980).

The original notification from the Secretary to the University outlined the nature of the "substantial assistance" which Iron Arrow received from the University in the following discussion:

> The assistance to the Iron Arrow Honor Society is of two types. First, Iron Arrow benefits from recognition and identification with the

University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial service, alumni mailings, and the use of meeting rooms.

The following background information, revealed in the investigation, is evidence of the Iron Arrow's recognition by and identification with the University: The Iron Arrow Society was established in 1926 by Dr. Bowman Foster Ashe, the first President of the University of Miami. In 1950, President Ashe gave the Society a University Charter and "signed into law" a Constitution for the organization, affixing his signature and title as President. According to the organization's head, Iron Arrow is the only campus group to receive a charter from the University.

The Society's constitution, as amended, allows for members to be either male students, faculty, administrative officials, staff or alumni of the University. It is stipulated that members "shall be selected on the prime basis of character and love for Alma Mater, with strong secondary criteria of leadership, scholarship, and humility as defined in the Ritual Book of the Tribe." The now operative amendments of the Society's constitution were "signed into law, A.D. 1971" by the current chief, or head, of the Society, and by you, the President of the University, with your title so designed.

A brochure prepared by the Society says that "Iron Arrow remains the University of Miami's

first and most esteemed tradition." The purpose of Iron Arrow as stated in the University's directory of student organization is "to recognize junior and senior men, faculty, staff, and alumni for meritorious achievement and outstanding contributions to the University and its community." In the University's catalogue, reference is made to Iron Arrow as "the highest recognition society for men."

The prestigious position of Iron Arrow is further seen in the location of a monument which stands on a knoll outside the student union building. A plaque thereon says, in part: "Iron Arrow — founded in 1926 as the University's highest honor."

Among other visible signs of Iron Arrow's prestige is a plaque on the wall just inside the entrance to the Ashe Building which houses administrative offices. The names of all members of Iron Arrow are included on additional mounts on the wall. In front of the plaque is a life-size statute of Dr. Ashe, the University's first President, and the founder of Iron Arrow.

Nearly all of the faculty and students interviewed by the investigators confirmed the fact that Iron Arrow is looked upon as the most prestigious organization on campus, and, as such, is particularly advantageous in employment opportunities.

In addition to the above described recognition received by Iron Arrow from the University,

the investigation revealed evidence of tangible support of Iron Arrow from the University. For example, the alumni association does mailings and covers postage for Iron Arrow material, although the organization itself pays for printing costs. The Student Activities Office provides secretarial support. Furthermore, the University assists Iron Arrow by handling three separate accounts from them in the University's finance office. Iron Arrow has a room in the student union building with its name outside the door. Additionally, Iron Arrow utilizes a projection room in the athletic building where it also maintains certain objects or symbols pertaining to the organization.

In addition to a faculty member regularly serving as advisor to Iron Arrow, there is further substantial support for the Society by the University in the various procedures and ceremonies associated with the selection of members. There are "screening committees" in each school of the University, composed of student and faculty members. The "Tapping" ceremony occurs during classes so that, when a faculty member is tapped for membership, he is led away by Iron Arrow members to join others in ceremonies at the monument outside the student union building.

[2] Although Iron Arrow and the University agreed thereafter that the latter would cease furnishing all of the physical assistance outlined in the foregoing letter with the exception of the use of the mound in front of

the student union building and the statute there for "tapping" for new members, the Secretary insisted that the non-tangible support was still sufficient to constitute "substantial assistance." We have recited the nature of this non-tangible support to indicate the basis on which the Secretary could well conclude that the activities of Iron Arrow in its sex discrimination policies were imputable to the University itself. Iron Arrow simply would not exist but for the University of Miami. The University created the honorary society apparently as an activity of great importance in the building of student morale and leadership. This cannot be denied. Although the University could exist without Iron Arrow, Iron Arrow could not exist without the University. The Society's argument that we should not consider this "substantial assistance" enough to bring it within the regulation simply falls of its own weight.

While we do not reach the ultimate question as to what, if anything, would be done by the University to completely withdraw assistance from Iron Arrow in order to bring itself into compliance without abandoning its males-only policy, we conclude that we are unable to imagine any continued association of the Society with the University of Miami that, in light of its history, would not constitute a continuation of the "substantial assistance" which the trial court found to exist.

We find that no proper final order has been entered in this case under F.R.C.P. 58. The order of dismissal is therefore not appealable. However, the denial of the permanent injunction is appealable and that order we now affirm.

The judgment is AFFIRMED.

IRON ARROW HONOR SOCIETY, a "tap" or recognition association for men; and John I. Benedict, individually and as Chief of Iron Arrow Honor Society,

Plaintiffs,

v.

Shirley M. HUFSTEDLER, Secretary of the Department of Education; William H. Thomas, Director, Office for Civil Rights, Department of Health, Education and Welfare (Region IV) et al.,

Defendants.

NO. 76-1850-Civ-EPS.

United States District Court,
S. D. Florida,
Miami Division.

Aug. 12, 1980.

Honor society brought action seeking to enjoin the Department of Health, Education and Welfare from issuing or interpreting regulation in such a way as to deter university from permitting society to conduct certain functions on university campuses, and seeking declaration of rights. On remand, after reversal, 597 F.2d 590, of dismissal of the complaint against HEW by James Lawrence King, J., the District Court, Spellman, J., held that: (1) Congress' authorization of regulatory jurisdiction to effectuate statutory requirement that no person shall be discriminated against on the basis of sex in any education program or activity receiving federal financial assistance was not exceeded by regulation precluding educational institutions receiving such

assistance from providing significant assistance to any organization discriminating on the basis of sex in providing any aid, benefit or service to students or employees, which reaches organizations that do not directly receive federal support; (2) regulation was not impermissibly vague or arbitrary; (3) university was providing "significant assistance" to plaintiff honor society; and (4) enforcement of the regulation as to plaintiff honor society based on unsolicited complaint from the university community was not arbitrary and discriminatory in light of evidence as to extraordinary value of membership in the society to career advancement.

Declaration accordingly.

1. Administrative Law and Procedure —760

Civil Rights —9.5

District court could not simply substitute its judgment for that of agency, and thus regulation of the Department of Health, Education and Welfare and HEW's interpretation of that regulation would be upheld unless they were unreasonable, arbitrary, beyond statutory jurisdiction or inadequately consistent with procedural requirements. 5 U.S.C.A. §706.

2. Health and Environment —20

Issuance of challenged regulation by the Department of Health, Education and Welfare was final agency action, and the agency's stated interpretation of the regulation was also final, given its nonreviewability by persons challenging it other than through the lawsuit,

and thus questions presented were ripe for judicial review. 5 U.S.C.A. §704.

3. Civil Rights —9.5

Congress' authorization of regulatory jurisdiction of the Department of Health, Education and Welfare to effectuate statute prohibiting sexual discrimination in any educational program or entity receiving federal assistance was not exceeded by regulation reaching honor societies not directly receiving federal support. Education Amendments of 1972, §§901-903, 20 U.S.C.A. §§1681-1683.

4. Administrative Law and Procedure —390

If standards governing application of regulation were so vague as to make inevitable arbitrary enforcement of the regulation, regulation could be struck down as being in violation of the Administrative Procedure Act. 5 U.S.C.A. §706.

5. Civil Rights —9.5

Department of Health, Education and Welfare regulation providing that educational institution receiving federal assistance shall not provide significant assistance to any organization which discriminates on basis of sex in providing aid, benefit or service to students or employees was not impermissibly vague in light of fact that, simultaneously with promulgation of the regulation, HEW established standards which would guide enforcement.

6. Civil Rights —9.5

Department of Health, Education and Welfare regulation providing that educational institution which receives federal assistance shall not provide significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees is not arbitrary, in that it is not contrary to, but instead is fully consistent with, governing statutes. Education Amendments of 1972, §§901.-903, 20 U.S.C.A. §§1681-1683.

7. Civil Rights —9.5

University was providing "significant assistance" to honor society within meaning of HEW regulation precluding educational institution receiving federal assistance from providing such assistance to organization which discriminates on the basis of sex in providing any aid, benefit or service to students or employees, in light, among other things of university's allowing society to use university property and special recognition given the society by university, and thus university was not in compliance with the regulation; that the society may have given more than it received from university supported rather than weakened such conclusion. Education Amendments of 1972, §§901, 902, 20 U.S.C.A. §§1681, 1682.

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law —278.5(1)

Fact that Department of Health, Education and Welfare chose to enfore regulation precluding educational institutions receiving federal assistance from providing significant assistance to organizations discriminating on the basis of sex in providing aid, benefit or service to students or employees by seeking voluntary compliance by university rather than formal hearing process did not deny due process to honor society which was the object of the proceeding. U.S.C.A.Const. Amend. 14.

9. Civil Rights —9.5

Enforcement against honor society on the basis of unsolicited complaint from university community of HEW regulation providing the educational institution receiving federal assistance shall not provide significant assistance to any organization which discriminates on the basis of sex in providing any aid, benefit or service to students was not arbitrary or discriminatory in light of evidence as to the extraordinary value of membership in the society in question to career advancement. Education Amendments of 1972, §§901, 902, 20 U.S.C.A. §§1681, 1682.

10. Civil Rights —9.5

Should university decide to resume some contacts with honor society which precluded women from membership, the Department of Health, Education and Welfare could not consistently with the Education Amendments of 1972 being hearing to terminate the university's general funding until HEW first sought

voluntary compliance. Education Amendments of 1972, §902, 20 U.S.C.A. §1682.

Elizabeth Du Fresne, Du Fresne & Du Fresne, Miami, Fla., for plaintiffs.

Alexander Ross, Dept. of Justice, Washington, D.C., for defendants.

ORDER AND MEMORANDUM OPINION

SPELLMAN, District Judge.

> Early in the morning, while the sky is still pale with night and the dew still wet on the grass, Iron Arrows begin to congregate at the tapping mound. There, on a small knoll beneath a shady ficus tree is the Iron Arrow monument. A few sticks of wood are placed in the firebowl, and soon the smell of smoke begins to drift across the campus. It is the tapping day. (Plaintiffs' Complaint p. 3).

Thus begins the tapping ceremony of the Iron Arrow Honor Society, an organization steeped in tradition and proud of its long association with the University of Miami. A major part of the tradition of the organization is its male – only membership policy. With the inexorable movement toward recognition and advancement of women's rights in the past decade, Iron Arrow's exclusive membership policy has naturally met strong opposition and hostility, yet the organization has steadfastly refused

to admit women, even when the federal government's threatened withdrawal of access to the federal fisc forced the University of Miami to disassociate itself from Iron Arrow. Resisting this intrusion by the federal government, which was apparently intended through indirection to work a transformation in the sexual attitudes of Iron Arrow, the organization has instead fought back by filing the present action.

In this action, the plaintiffs seek to enjoin the federal defendant from issuing or interpreting its Regulation 86.31(b)(7) in such a way as to deter the University of Miami from permitting the Iron Arrow Honor Society to conduct certain functions on the University campus. The plaintiffs also seek a declaration of their rights with regard to the issuance and enforcement of Regulation 86.31(b)(7). Jurisdiction is founded on 28 U.S.C. §§1331 and 2201, 20 U.S.C. §§1683 and 5 U.S.C. §701, et seq.

This suit was originally brought by the plaintiffs in October, 1976 against defendants Department of Health, Education, and Welfare (hereafter "H.E.W.") and the University of Miami. The District Court heard the case upon the plaintiffs' demand for a temporary injunction, denied temporary relief, and subsequently dismissed the action as to the University, stating that the plaintiffs have no federal cause of action against the University. The Court also dismissed the complaint as to H.E.W. on the ground that the plaintiffs lacked standing to complain of an H.E.W. action which only indirectly affected the plaintiffs. On appeal, the decision of the District Court was affirmed as to the dismissal of the complaint against the University, but reversed

as to the dismissal of the complaint against H.E.W., 597 F.2d 590 (5th Cir. 1979).

Referring to a statement made by the University which this Court has been unable to find in the record or the pleadings, the Fifth Circuit held:

> In light of the unequivocal statement of the position of the University of Miami that but for the action of the Secretary of Health, Education and Welfare it would not have and would not in the future bar the Iron Arrow Honor Society from its campus, the decision of the district court on standing of the Society is reversed.

Id., at 590.

The case is presently before this Court on cross–motions for summary judgment. All the parties agree that there are no factual issues to be resolved. Despite the previous disimssal of the University defendant, the Court has *sua sponte* joined the University of Miami as an indispensable party in order to assure that adequate relief can be afforded by the decision of this Court. Fed.R. Civ.Proc. 19.

The facts are undisputed. In 1973, the Office of Civil Rights, a subdivision of H.E.W., received a personal complaint charging that Iron Arrow Honor Society (hereafter "Iron Arrow") systematically discriminated against females by excluding them from membership in the society. The complaint also charged that Iron Arrow discriminated against American Indians, both in membership policies and by adopting certain Seminole

Indian customs and attire for the society's activities. H.E.W. notified the University of Miami that these complaints were being investigated, and in October, 1973 H.E.W. informed the University that the complaint as to discrimination against American Indians was not supported by the facts.

> We do not find evidence to support a claim that the Society's use of Indian ritual and appurtenances is, per se, demeaning of either Seminole or Mikasukee Indians or Indians in general. Indeed, our investigation shows that qualities of life and philosophy portrayed in the Society's ritual show Indians in what must be considered a positive or favorable light.

(Letter of William H. Thomas, Office of Civil Rights, to the University of Miami, dated October 25, 1973).

The University was simultaneously informed that consideration of the sex discrimination claim had been postponed.

> Our resolution of the sex discrimination aspect of this complaint will have to await the issuance of guidelines for the implementation of Title IX of the Education Amendments of 1972. These should be ready sometime in the fall, at which time we will pursue our investigation into the status of the Iron Arrow Society and the University's obligations to comply with the requirements of Title IX and

implementing rules and regulations issued pursuant to the legislation.

Id.

H.E.W. regulations implementing the Title IX legislation were subsequently issued and became effective on July 21, 1975. On May 25, 1976, H.E.W.'s Office of Civil Rights informed the University that it had concluded its investigation of Iron Arrow and found that the University was in violation of H.E.W. Regulation 45 C.F.R. 86.-31(b)(7), which states.

> . . . a recipient shall not, on the basis of sex:
>
> Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees: . . .

H.E.W. stated to the University,

> Accordingly, we are informing you that in order for the University of Miami to fulfill its obligations under Title IX, it must either require the Iron Arrow Honor Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society.

(Letter of William H. Thomas, Office of Civil Rights, to the University of Miami, received May 25, 1976).

The facts relied on in the above letter for the conclusion that the University provided "significant assistance" to Iron Arrow include the following: the University's provision of secretarial services, alumni mailings, and meeting rooms to Iron Arrow; the establishment of Iron Arrow by the founding President of the University of Miami in the year that the University was founded; the signature of the President of the University on the Iron Arrow constitution; the charter issued to Iron Arrow by the University; reference in the University catalogue to Iron Arrow as "the highest recognition society for men"; the existence of a monument to Iron Arrow on a mound outside the University's student union building; other campus plaques and statutes honoring Iron Arrow and its members; the University's acquiescence in the association of the University faculty as advisors and as screening committees for admission of new members to the society; and the Iron Arrow tapping ceremony, which was regularly conducted on the University's campus.

In June, 1976, the University requested additional time before compliance with the requirements of Title IX was ordered and requested of H.E.W. that it consider Iron Arrow's contention that it no longer received significant assistance from the University. The extension of time was granted, but reconsideration of Iron Arrow's position did not alter H.E.W.'s findings, and H.E.W.'s position with regard to seeking compliance by the University remained unchanged. (Plaintiffs' exhibit #3).

In September, 1976, after meetings with Iron Arrow members, President Stanford of the University of Miami requested of H.E.W. an additional extension of time before any action was taken against the University.

H.E.W. responded by allowing an extension until December 15, 1976, upon the condition that the campus tapping ceremony of Iron Arrow could not take place until the compliance question was resolved.

The University thereupon prohibited Iron Arrow from performing its tapping ceremony on the campus. Iron Arrow responded by bringing this lawsuit.

I.

Scope of review.

The regulation which H.E.W. relied on in seeking compliance by the University was adopted pursuant to 20 U.S.C. §1682, which states, in pertinent part,

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the statute authorizing the financial assistance in connection with which the action is taken.
>
> . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been made,

and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found . . . . *Provided however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

The statute to be implemented, 20 U.S.C. §1681, provides, in pertinent part,

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: . . .

(6) this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership consists primarily of students in an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one

sex and principally to persons of less than nineteen years of age;

. . . . .

The plaintiffs present no constitutional challenge to Congress' delegation to H.E.W. of the power to adopt regulations consistent with the statutory purpose. Moreover, the regulations were issued in full compliance with provisions regarding notice and comment rule-making in the Administrative Procedure Act, 5 U.S.C. §553, and the plaintiffs do not challenge the procedure followed in issuing Regulation 86.31(b)(7), 40 Federal Register 24128.

The plaintiffs' challenge to the regulation in question is based on the grounds that it exceeds the statutory delegation of authority, or is arbitrary, capricious, or an abuse of discretion. Plaintiffs also contend that H.E.W.'s interpretation of its regulation is unreasonable or arbitrary, and that plaintiffs were denied a hearing or other procedural safeguards available under 5 U.S.C. §701, et seq.

Under the Administrative Procedure Act, 5 U.S.C. §706, this Court's scope of review of administrative action is broad enough to encompass all of the relief sought by the plaintiffs including declaratory relief. The statute requires this court, "[t]o the extent necessary to decision and where presented . . . [t]o decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action." 5 U.S.C. §706.

[1] This Court may not, however, simply substitute its judgment for that of the agency. H.E.W.'s regulation and its interpretation of that regulation will be upheld unless they are unreasonable, arbitrary, beyond statutory jurisdiction, or inadequately consistent with procedural requirements. 5 U.S.C. §706; *P.P.G. Industries, Inc. v. Harrison*, 587 F.2d 237, reh. denied 591 F.2d 102 (5th Cir. 1979), reversed on other grounds ____ U.S. ____, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980); *Bank of Commerce of Laredo v. City National Bank of Laredo*, 484 F.2d 284 (5th Cir. 1973), cert. denied 416 U.S. 905, 94 S.Ct. 1609, 40 L.Ed.2d 109; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

[2] Plaintiff's final jurisdictional hurdles involve the related issues of ripeness, finality of agency action and exhaustion of administrative remedies. The plaintiffs are not presently entitled to any further administrative review of their claim. 20 U.S.C. §1682. Moreover, even if such review were available, the issuance of the challenged regulation is itself a final agency action under 5 U.S.C. §704, and H.E.W.'s stated interpretation of the regulation is also final, given its non-reviewability by the plaintiffs other than through this lawsuit. *Romeo Community Schools v. U. S. Dept. of Health*, 438 F.Supp. 1021, 1027 (E.D.Mich. 1977) affirmed 600 F.2d 581 (6th Cir. 1979). Thus, the case is appropriate for decision by this Court and the questions presented are ripe for judicial review *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

II.

Statutory jurisdiction for the issuance of the regulation.

[3] 20 U.S.C. §1682 authorizes certain federal agencies, including H.E.W., to issue regulations to "effectuate" the provisions of 20 U.S.C. §1681, which prohibits sexual discrimination in any educational program or activity receiving federal assistance. The plaintiffs do not directly claim that Regulation 86.31(b)(7), enacted pursuant to §1682, does not effectuate §1681, but rather that "the Congress did not intend that honor and recognition societies operating, as Plaintiff, in independent orbit about a university, be denied the right to exclude persons based on sex . . ." (Complaint p. 9).

This Court must examine the regulation to determine if it effectuates the substantive statute by reaching discrimination in an organization which does not directly receive federal support. To do so, it is necessary to define the effects which §1681 is intended to bring about. Section 1681 is patterned after 42 U.S.C. §2000d, Title VI of the Civil Rights Act, which seeks to eliminate federal support of racial discrimination in American society. The Supreme Court, in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), found the thrust of §1681 to be equally clear; the statute seeks to eliminate federal support of educational programs and activities which sexually discriminate against students. *Id.* at 704, 99 S.Ct. at 1961.

This goal is, in turn, part of the broader social objective of completely eliminating invidious discrimination on the basis of sex. Elimination of racial

discrimination through integration in the schools has been a constant commitment of this country since 1954. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.873 (1954), and it was advanced by the 1964 Civil Rights Act. It is widely believed that full equality of educational rights and opportunities will lead to wide-ranging social and economic advancement by persons who have in the past been treated as second-class citizens. This belief in the power of education to eliminate the effects of past discrimination and inequalities plays an important part in the structure of American values, and this importance was reflected in the legislative history of the Title IX legislation. 1972 U.S.Code Cong. and Admin. News, p. 2462, et seq.

House Report No. 554 noted extensive discrimination by American universities in their admissions policies and also focused on the issue of discrimination suffered by women faculty at colleges and universities. *Id.* at 2512. The report emphasizes the close relationship between Title VII of the Civil Rights Act of 1964 and the present legislation, especially as it relates to equalizing employment opportunities for women. *Id.* at 2512.

This career advancement notion was reinforced by Senator Bayh's statement regarding the 1974 amendment of §1683 to exclude social fraternities, the YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls, as well as high school youth service groups from the statute's prohibition. "[T]his exemption covers only social Greek organizations; it does not apply to professional fraternities or sororities whose admission practices might have a discriminatory effect on the future career opportunities of a woman." Dec. 16, 1974, Cong. Record at s21568.

The defendant contends that the non-inclusion of one-sex honor societies from the 1974 exemption indicates Congressional intent to reach such organizations through §§1681 and 1682. While the limited nature of the exemption precludes any affirmative reading of the amendment, certainly the exemption is not inconsistent with a Congressional intent to reach sexually discriminatory honor societies in close association with a university receiving federal assistance.[1]

The H.E.W. regulation 86.31(b)(7) states that educational institutions which receive federal assistance shall not perpetuate sexual discrimination by providing significant assistance to an organization which discriminates in providing any aid, benefit, or service to students. H.E.W. explained its regulation as follows in the Federal Register:

> The language in subparagraph 86.31(b)(7) has been in response to comments in order to clarify the Department's position when agencies, organizations or persons not part of the recipient would be subject to the requirements of the regulation. Some of these "outside" organizations have been exempted from Title IX with respect to their membership policies by a recent

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[1]In light of the Fifth Circuit's recent opinion in *Dougherty County School System v. Harris*, 622 F.2d 735 at 737, this Court here notes its finding, implicit in the present opinion but apparently explicitly required by the *Dougherty* opinion, that the University of Miami is an "educational program or activity" under the terms of 20 U.S.C. §§1681 and 1682, and that Regulation 86.31(b)(7) was intended to and does apply only to such specific programs as, for example, universities which receive general grants of federal support.

> amendment to the Statute which was enacted in late 1974. This amendment is reflected, as already noted, in §86.14 which exempts social fraternities . . . . Other groups, however, such as business and professional fraternities and sororities and honor societies continue to be covered. The regulation provides that if the recipient furnishes the "outside" agency or organization with "significant assistance," the "outside" agency or organization becomes so connected with the education program or activity of the recipient that any discriminatory policies or practices for which it is responsible become attributable to the recipient. [40 Federal Register 24132]

The standards articulated in H.E.W.'s explanation are more rigorous in requiring a close connection between recipient and honor society than is the nexus requirement employed in state action analysis for the purpose of enforcing the Fourteenth Amendment to private persons and organizations. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

As a matter of law, the Court finds that this regulation, though it may reach activities once-removed from direct federal assistance, is nevertheless useful and necessary to the effectuation of 20 U.S.C. §1681, which demands an end to federal governmental support of the perpetuation of discrimination against women in educational institutions. Sexually discriminatory honor societies significantly assisted by federally supported universities perpetuate sexual discrimination. Thus,

Congress' authorization of regulatory jurisdiction to effectuate 20 U.S.C. §1681 was not exceeded by H.E.W. Regulation 86.31(b)(7), which reaches organizations that do not directly receive federal support.

III.

Issues of vagueness, reasonableness and arbitrariness of the regulation.

[4] The regulation purports to reach organizations which sexually discriminate in providing any "aid, benefit, or service" to students and to which a recipient of federal support provides "significant assistance". The two above-quoted terms are capable of widely varying interpretations. This is not necessarily an unacceptable condition of such regulations. However, if the Court were to find that these standards were so vague as to make inevitable the arbitrary enforcement of the regulation, the regulation could be struck down as being in violation of the Administrative Procedure Act, 5 U.S.C. §706. See *PPG Industries* . . ., supra. Also, if the agency enforcing the regulation interpreted these standards so unreasonably that the standards no longer guided agency discretion, the regulation could be declared invalid.

[5] Neither of these problems exist as to the present regulation. Simultaneously with the promulgation of this regulation, H.E.W. established the standards which would guide its enforcement of the regulation.

H.E.W.'s explanation stated:

> Thus, such forms of assistance as faculty sponsors, facilities, administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations.

40 Federal Register 24132.

H.E.W. also indicated that it considered honor societies within the scope of the regulation.

These interpretations eliminate much of the vagueness of the language in the regulation. Moreover, they are reasonable guides to the exercise of administrative discretion in enforcing the regulation. So long as the agency devises clear standards to guide its actions, this Court will subject agency action to scrutiny on the basis of those standards.

[6] On the question of arbitrariness, the Court finds that the regulation is not contrary to, but is instead fully consistent with, governing statutes. The Court also finds that the regulation, as limited by H.E.W.'s interpretive explanation, is not unduly vague.

IV.

Application of the regulation to the present case—the issue of significant assistance.

In 1976, the University of Miami was a recipient of federal funds administered by H.E.W. Iron Arrow

provided aid, benefits and services to selected students of the University of Miami. Iron Arrow openly discriminated in its admission policies and practices on the basis of sex. Thus, Regulation 86.31(b)(7) was applicable to the University's relationship to Iron Arrow if the University provided "significant assistance" to Iron Arrow.

A review by this Court fails to disclose any prior occasion where the particular regulation in question has been judicially interpreted and from which this Court could secure some guideline in dealing with the facts and circumstances surrounding this case.

In *Webster's Third New International Dictionary*, "significant" is defined as "having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE (even though the individual results may seem small, the total of them is [significant]—F. D. Roosevelt."

"Significant assistance", according to H.E.W., can be of two forms: tangible support or intangible support. Tangible support includes direct financial assistance, the provision of facilities, equipment, or real property, secretarial and management services. Intangible support includes actions which identify the university with the discriminatory organization or bestow recognition upon the organization, such as provision of a faculty sponsor or advisor.

In the instant case, the Court finds its role as harbinger in seeking to interpret the term "significant assistance" and apply that term to the relationship between the University of Miami and the Iron Arrow

Society to be less than an enjoyable task. Although federal jurisdiction has never extended to actions brought for dissolutionment of marriage, this Court cannot help but feel the same burden that must be placed on chancellors who preside over such cases when it is acknowledged that the decision that must ultimately be reached will place an indelible scar on the parties before the Court. The relationship of the University and Iron Arrow can almost be described as an incestuous marriage. Not only has there existed matrimony, scheduled to culminate in a golden wedding anniversary which never took place, but Iron Arrow came from the very womb of the University of Miami, was held close to its bosom and was nurtured as a child until it became a bright, successful and outstanding member of the community, looked upon by its parent with pride and satisfaction.

[7] As pointed out above, the determination of what is "significant" enough to create the nexus and to render Iron Arrow subject to the regulation must turn on the facts and circumstances of the specific situation — what assistance might be significant to one organization might be insignificant to another. In this regard, in analyzing the relationship which has developed over the last fifty years between the University and Iron Arrow, one cannot help but believe that in this particular regard Iron Arrow is truly placed in a "Catch 22". The success and outstanding achievement developed over the last fifty years results in this Court finding that the degree of assistance necessary to create the nexus which would bring about subjecting the organization to the regulation in question is far less than it would be if the organization had been less successful and did not

enjoy the stature it has achieved. That is not to say that the assistance rendered by the University of Miami at the time this lawsuit was instituted was not in fact significant but quite the contrary.

In its letter informing the University of Miami of its noncompliance with Regulation 86.31(b)(7), H.E.W. cited a long list of tangible and intangible support, much of it of a very special or even unique nature in the relationship between Iron Arrow and the University. Although the relationship may have changed since H.E.W.'s May 25, 1976 letter, whether or not because of the demand for compliance, the relationship between Iron Arrow and the University had been and continued to be a very close one in the Spring of 1976.

The forms of assistance given by the University to Iron Arrow adduced during this lawsuit include: the use of real property located in front of the student union building in the center of the campus, called by Iron Arrow a "mound" and bearing a monument exalting Iron Arrow as "the highest honor in the University of Miami"; the existence of other plaques and statues throughout the campus recognizing Iron Arrow; the special recognition given to Iron Arrow at the University's homecoming football game; the use of the campus for Iron Arrow's tapping ceremony which takes place on the mound, a charter given to Iron Arrow by the University; the formal sponsorship of Iron Arrow by every president of the University throughout its history; the provision of secretarial services, mail boxes, mailing labels, and special meeting rooms to Iron Arrow, the existence of a faculty screening committee to propose new members to the society; and the special recognition

of Iron Arrow in the University catalogue as the "highest recognition society for men."

Plaintiffs insist that they receive no direct financial support from the University of Miami. Nevertheless, Plaintiffs' complaint alleges that the loss of University supported homecoming activities involving Iron Arrow will, by itself, result in the loss of more than $10,000.00 to Iron Arrow. Defendant contends that the Plaintiffs' own complaint thus establishes significant assistance by showing how much Plaintiffs stand to lose by disassociation with the University of Miami. This Court does not accept that automatic standard for significance. Surely, significance must be judged by an objective standard, rather than the mere subjective importance the organization attaches to the assistance. However, $10,000.00 may well be objectively significant.

Furthermore, the Court wishes to disabuse the Plaintiffs of their mistaken impression that it is helpful to their cause that Iron Arrow may have "given much more than it received from the University of Miami." Such a mutually beneficial relationship tends rather to establish a closer nexus between the organization and the University. Here, Fourteenth Amendment state action doctrine provides a useful analogy. In *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), the Supreme Court held that private schools were significantly aided by the State of Mississippi's program of providing textbooks to children in private schools which racially discriminated in their admissions policies. This aid was held to violate the equal protection clause of the Fourteenth Amendment, notwithstanding the obvious fact that the private schools saved the

state from making huge increase in expenditures for public education.

Based on the facts and circumstances surrounding this case, the Court cannot help but quote the phrase attributed by *Webster* to Franklin Delano Roosevelt, *supra*, "even though the individual (assistance) may seem small, the total of them is significant." In the face of Plaintiffs' admissions and the overwhelming and undisputed evidence of continuous, significant, and occasionally uniquely significant assistance provided to Iron Arrow by the University of Miami, the Court finds as a matter of law that H.E.W. correctly informed the University of Miami in 1976 that the University was not in compliance with H.E.W. Regulation 86.31(b)(7).

V.

H.E.W.'s enforcement procedure and its exercise of discretion to seek compliance in the present case.

[8] H.E.W. chose to enforce its regulation in this case by seeking voluntary compliance by the University of Miami rather than through a formal hearing process. While a hearing might have led to an earlier resolution of this case, H.E.W. was correctly following the clear statutory mandate in 20 U.S.C. §1682 to first attempt to induce voluntary compliance with its regulations, and then, only if that attempt fails, to begin hearings on the termination of funds. No party was denied a meaningful opportunity for review of the agency's action under the statutory procedure. This Court has given

the plaintiffs an opportunity to raise all objections it has to agency action and it is clear that the plaintiffs have not been deprived of life, liberty or property without due process of law.

[9] The plaintiffs have suggested that enforcement of Regulation 86.31(b)(7) as to Iron Arrow was arbitrary and discriminatory. The claim is unpersuasive. Iron Arrow is a highly appropriate subject of H.E.W. scrutiny given the purpose of Section 1681. Testimony at the hearing on Plaintiffs' demand for a temporary injunction by Judge Rhea Grossman, a witness for the Plaintiff, demonstrated the extraordinary value of Iron Arrow membership to career advancement. Judge Grossman stated that often a prospective employee's Iron Arrow membership is the only fact arousing the interest of a prospective employer.

The prestige and importance of Iron Arrow extends far beyond the campus of the University of Miami. Members of Iron Arrow have risen to prominent positions in the legal, political, business, and other professional communities in the Miami area. The present and previous mayors of the City of Miami and a former Dade County State Attorney, the University's athletic heroes, now prominent in professional sports, and many other successful and well known persons highlight the membership role of Iron Arrow. Thus, it is no wonder that Iron Arrow may be viewed as a very valuable benefit to students in terms of employment opportunity and career advancement, a benefit completely denied to women.

Iron Arrow may consider it ironic that its organization may have been singled out simply because it has been

prominent and successful. Nevertheless, the Court finds that the selection of Iron Arrow for investigation, based on an unsolicited complaint from the University community was not arbitrary, but was instead fully within the progressive spirit of §§1681 and 1682.

VI.

Declaratory relief.

This Court has evaluated H.E.W. Regulation 86.31(b)(7) and, as a matter of law, found it to be a proper exercise of statutory authority. The Court has also, as a matter of law, approved H.E.W.'s explanation of that regulation at 40 Federal Register 24132. The Court has found, as a matter of law, that H.E.W. correctly applied its regulation to the University of Miami in 1976. Finally, the Court has held, as a matter of law, that the enforcement procedure used by H.E.W. was proper and that the selection of Iron Arrow as a subject of investigation was not arbitrary or discriminatory

[10] The Court has not been presented with a sufficient factual basis to determine whether the University of Miami is now complying with Regulation 86.31(b)(7), nor is such an issue ripe for determination by this Court. However, the Court will state that should the University of Miami, at this time, decide to resume some contacts with Iron Arrow, H.E.W. could not consistently with §1682 begin a hearing to terminate the University's general federal funding until H.E.W. had first sought voluntary compliance. Further declaratory relief on the cross-motions for summary judgment is denied.

EXHIBIT 2

May 24, 1976

Dr. Henry King Stanford
President
University of Miami
Coral Gables, Florida 33124

Dear Dr. Stanford:

The Office for Civil Rights has concluded its investigation of a class complaint which alleges that the University of Miami is in violation of Title IX of the Education Amendments of 1972 because of the practice of the Iron Arrow Honor Society in excluding women from membership.

The complaint, which was originally filed on April 7, 1973, alleged that the Iron Arrow Honor Society at the University of Miami was both demeaning of American Indians in its utilization of Seminole Indian rituals and attire and discriminatory against women by its admitted policy of excluding them from membership.

The first charge noted above, was previously investigated by our office under Title VI of the Civil Rights Act of 1964 and a no cause finding was made. The University was advised of this finding on October 25, 1973. This letter addresses our findings on the second allegation of the complaint, based on an investigation conducted on-site in December of 1973

and pursuant to information and materials furnished us by the University.

As you know, Title IX prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance, except for certain exemptions not relevant to this case. The implementating Title IX regulation (a copy of which is enclosed) became effective July 21, 1975, and Section 86.31(b)(7) provides that:

> Except as provided in this subpart, in providing any aid, benefits, or service to a student, a recipient shall not, on the basis of sex:
>
> * * *
>
> (7) Aid or perputate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

The membership practices and policies of professional fraternal organizations, academic clubs, or honorary societies such as the Iron Arrow Honor Society are not directly covered by Title IX unless such organizations receive direct Federal financial assistance. However, if such practices and policies are discriminatory, they would place an institution subject to Title IX in violation of that provision where the institution aids the discriminatory organization as described in 86.31(b)(7). If the institution provides a faculty sponsor, meeting rooms, use of the institution's mail service, space in the

catalogue, or special recognition for the members, the institution is, in most cases, providing significant assistance so as to create the required nexus between Title IX and the organization. Certainly if the organization could not exist in its present form but for the assistance, it would be considered "significant." In order to be in compliance with Title IX, the institution must assure that the organization it assists conducts its activities in compliance with Title IX as a condition of providing the assistance.

It is undisputed that the University of Miami receives Federal financial assistance in the form of student aid and that the Iron Arrow Honor Society does not admit women to membership. Such facts indicate that the University of Miami is in noncompliance with Title IX if the University provides significant assistance to Iron Arrow. We conclude that it does provide such assistance based upon the factors discussed below.

The assistance to the Iron Arrow Honor Society is of two types. First, Iron Arrow benefits from recognition and identification with the University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial service, alumni mailings, and the use of meeting rooms.

The following background information, revealed in the investigation, is evidence of the Iron Arrow's recognition by and identification with the University: The Iron Arrow Society was established in 1926 by Dr. Bowman Foster Ashe, the first President of the University of Miami. In 1950, President Ashe gave the Society a University Charter and "signed into law" a Constitution for the organization, affixing his signature and title as

President. According to the organization's head, Iron Arrow is the only campus group to receive a charter from the University.

The Society's constitution, as amended, allows for members to be either male students, faculty, administrative officials, staff or alumni of the University. It is stipulated that members "shall be selected on the prime basis of character and love for Alma Mater, with strong secondary criteria of leadership, scholarship, and humility as defined in the Ritual Book of the Tribe." The now operative amendments of the Society's constitution were "signed into law, A.D. 1971" by the current chief, or head, of the Society, and by you, the President of the University, with your title so designated.

A brochure prepared by the Society says that "Iron Arrow remains the University of Miami's first and most esteemed tradition." The purpose of Iron Arrow as stated in the University's directory of student organization is "to recognize junior and senior men, faculty, staff, and alumni for meritorious achievement and outstanding contributions to the University and its community." In the University's catalogue, reference is made to Iron Arrow as "the highest recognition society for men."

The prestigious position of Iron Arrow is further seen in the location of a monument which stands on a knoll outside the student union building. A plaque thereon says, in part: "Iron Arrow—founded in 1926 as the University's highest honor."

Among other visible signs of Iron Arrow's prestige is a plaque on the wall just inside the entrance to the

Ashe Building which houses administrative offices. The names of all members of Iron Arrow are included on additional mounts on the wall. In front of the plaque is a life-size statute of Dr. Ashe, the University's first President, and the founder of Iron Arrow.

Nearly all of the faculty and students interviewed by the investigators confirmed the fact that Iron Arrow is looked upon as the most prestigious organization on campus, and, as such, is particularly advantageous in employment opportunities.

In addition to the above described recognition received by Iron Arrow from the University, the investigation revealed evidence of tangible support of Iron Arrow from the University. For example, the alumni association does mailings and covers postage for Iron Arrow material, although the organization itself pays for printing costs. The Student Activities Office provides secretarial support. Furthermore, the University assists Iron Arrow by handling three separate accounts for them in the University's finance office. Iron Arrow has a room in the student union building with its name outside the door. Additionally, Iron Arrow utilizes a projection room in the athletic building where it also maintains certain objects or symbols pertaining to the organization.

In addition to a faculty member regularly serving as advisor to Iron Arrow, there is further substantial support for the Society by the University in the various procedures and ceremonies associated with the selection of members. There are "screening committees" in each school of the University, composed of student and faculty members. The "Tapping" ceremony occurs during classes

so that, when a faculty member is tapped for membership, he is led away by Iron Arrow members to join others in ceremonies at the monument outside the student union building.

Based on these above factors, we have determined that the University of Miami significantly assists the Iron Arrow Honor Society which discriminates against women by excluding them from membership. Accordingly, we are informing you that in order for the University of Miami to fulfill its obligation under Title IX, it must either require the Iron Arrow Honor Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society.

Within thirty days of the receipt of this letter, please submit to OCR information indicating actions you intend to take regarding this matter. You should plan to complete any such actions within ninety days of the receipt of this letter.

If you have any questions concerning this matter or if we may otherwise assist you, please contact John Morris of our staff who may be reached by telephone at (404) 526-2491.

Sincerely,

/s/ William H. Thomas
William H. Thomas, Director
Office for Civil Rights
(Region IV)

EXHIBIT 3

July 30, 1976

Dr. Henry King Stanford
Office of the President
University of Miami
Coral Gables, Florida 33124

Dear President Stanford:

This is to acknowledge our receipt of your letter of June 21, 1976, following your conference in our Office on June 17 on our findings in the case of the Iron Arrow Honor Society.

We will extend the time for the University to come into compliance with Title IX, insofar as Iron Arrow is concerned, until September 30. Naturally, we hope that the matter can be settled voluntarily.

We have reviewed Mr. John T. Benedict's memorandum regarding changes in the relationships between Iron Arrow Society and the University. The Memorandum does not alter our findings set forth in our May 24, 1976 letter. There continues to be a significant relationship between the Society and the University for coverage of the Society under Title IX of the Educational Amendments of 1972.

With reference to Mr. Benedict's claim that other University-supported organizations discriminate on the basis of race and sex, it is the University's responsibility:

(1) to insure that any such organizations which may exist and are not exempt from Title VI and IX coverage, respectively, expeditiously provide assurance to the University of their discontinuation of discriminatory policies; or (2) to discontinue its support of the non-exempt organizations.

If you should have any questions about our views on this matter, feel free to call me at Area Code (404) 526-3312. In the meantime, we will await word from you by or soon after September 30 as to the disposition of the matter.

Sincerely,

/s/ William H. Thomas
William H. Thomas, Director
Office for Civil Rights
Region IV

EXHIBIT 4

September 28, 1976

Mr. William H. Thomas, Director
Office for Civil Rights
Department of Health, Education,
and Welfare – Region IV
50 7th Street, N.E., Room 10
Atlanta, Georgia 30323

Dear Mr. Thomas:

This letter is a report to you on steps being taken by the University of Miami to bring the University in compliance with Title IX with respect to its relationship to the Iron Arrow Society.

You will recall that I asked for an extension of time through September in order that I might have an opportunity to talk with as large a number of members of the Iron Arrow Society as possible inasmuch as many of them, including alumni and faculty members, were on vacation during the summer. Now that the University has begun the fall semester, I have had an opportunity to meet with Iron Arrow representatives twice.

The first meeting occurred on September 9. There were approximately 30 members of the Society present. I discussed with them the letter which I had received from you. I explained to them that the HEW action is not directed against Iron Arrow, but against the

University of Miami. It was in this light, I said, that the Board of Trustees and I had to consider your letter. I told them that I thought Iron Arrow should admit women. While there was some heated denunciation of the HEW action, I was surprised that several members spoke out in favor of the admission of women. I then proposed that I invite to my home the entire membership for a general discussion, as I did not regard the relatively small number in attendance at the meeting as necessarily representative of the opinion of the entire membership.

On September 16 I had a second meeting with the officers of the Society and their attorney, Mr. John Chavez, a full-blooded Pueblo Indian, by the way. We discussed plans for the general membership meeting. I said that I would send the letter out over my signature extending the invitation to meet with me on the grounds of my home. A copy of the letter I propose to send is enclosed with this letter.

We are now trying to determine the date which would be most convenient for everyone in light of the heavy fall calendar. It will be impossible for me to get out a good representation of the membership before September 30. If your office would be willing to extend the date for final word from the University of Miami as to how the University will be brought into compliance with Title IX, it would give me better leeway in which to try to encourage voluntary acceptance by Iron Arrow of the principle of admission of women. This means that I would be able to inform you definitely by December 15, the end of the fall semester, as to whether Iron Arrow will accept women or the University will

discontinue its support of Iron Arrow. I do hope that your office will be willing to grant this extension.

Sincerely yours,

Henry King Stanford
President

[FILED MAY 24 1977]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 76-1850-Civ-JLK

IRON ARROW HONOR SOCIETY, et al,
Plaintiff,

vs.

FORREST MATTHEWS, et al,
Defendants.

ORDER OF DISMISSAL

This cause came on for consideration upon the parties' cross-motions for summary judgment and/or judgment on the pleadings. The court, having considered the record and being fully advised in the premises, finds and concludes that plaintiffs lack standing to sue and therefore the cause should be dismissed.

The District Court's jurisdiction to review agency action is limited to allegations that the complainant has been directly aggrieved or adversely affected, or caused to suffer legal injury. 5 U.S.C. §701 *et seq;* 28 U.S.C. §1331; *Califano v. Sanders,* _____ U.S. _____ (Feb. 23, 1977).

Plaintiffs' alleged injury concerns the refusal of the University of Miami to allow Iron Arrow's fall tapping ceremony to be held at the university's

homecoming festivities. Thus, plaintiffs' "injury in fact" was not caused by any act, regulation, or directive of defendant HEW; it was caused by the university's decision to comply with, rather than seek review of, that agency's regulations concerning sex-based discrimination in the membership policies of an educational institution's clubs. While the university arguably would have standing to contest the validity of HEW's regulations and directives a "person aggrieved," plaintiffs have no such standing. Although they may have suffered injury in fact, that injury is not directly attributable to agency action. Additionally, plaintiffs have no federal cause of action against the university. It is therefore

ORDERED and ADJUDGED that plaintiffs' complaint be and the same is hereby dismissed for lack of standing, without prejudice to the university's right to seek judicial review to agency action, should it so desire, and without prejudice to plaintiffs' right to bring any appropriate action against the university in state forum.

DONE and ORDERED in chambers at Miami, Florida, this 20th day of May, 1977.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: Elizabeth DuFresne
Mershon, Sawyer, Johnston, Dunwody and Cole

IRON ARROW HONOR SOCIETY, etc.,
Plaintiff-Appellant,

John T. Benedict, etc.,
Plaintiff,

v.

Joseph A. CALIFANO, Jr., Secretary of Health, Education and Welfare, et al.,
Defendants-Appellees.

No. 77—2375.

United States Court of Appeals,
Fifth Circuit.

June 11, 1979.

Honor society brought action against the Secretary of the Department of Health, Education and Welfare. The United States District Court for the Southern District of Florida, James Lawrence King, J., dismissed on ground that society was without standing to sue and the Society appealed. The Court of Appeals held that the district court's finding of lacking of standing for honor society to sue Department of Health, Education and Welfare was reversed in light of University's admission that but for HEW's actions, society would not have been excluded from campus activities.

Reversed.

Civil Rights —13.6

Colleges and Universities —10

Federal Civil Procedure —131.147

Court of Appeals reversed district court's finding of lack of standing for honor society to sue Department of Health, Education and Welfare in light of University's admission that but for HEW's actions, society would not have been excluded from campus activities.

Elizabeth J. duFresne, Miami, Fla., for plaintiff-appellant.

Jacob V. Eskenazi, U. S. Atty., Miami, Fla., Alexander C. Ross, Drew S. Days, III, Attys., U. S. Dept. of Justice, Washington, D. C., Charles C. Kline, Miami, Fla., Teresa T. Milton, Atty., Dept. of Justice, Washington, D. C., Byron B. Mathews, Jr., Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida; James Lawrence King, Judge.

Before BROWN, Chief Judge, CLARK and VANCE, Circuit Judges.

PER CURIAM:

In light of the unequivocal statement of the position of the University of Miami that but for the action of the Secretary of Health, Education and Welfare it would

not have barred and would not in the future bar the Iron Arrow Honor Society from its campus, the decision of the district court on standing of the Society is reversed. *Gladstone Realtors v. Village of Bellwood, Part II*, ____ U.S. ____, ____, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978).

REVERSED.